The financial restructuring of a distress group in a cross border environment

Case study

SYMPOSIUM ORGANIZED BY INTERNATIONAL INSOLVENCY INSTITUTE (III) AND FRANCE AMERIQUES

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INTRODUCTION

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CGG SA is the holding company of CGG Group, a global industrial operator in geophysical and geological services. Further to the collapse of the geoscience market, CGG Group has registered a substantial deterioration of its revenue over the past four years (-$2.6 billion) and its cumulative loss over four years reached over $3.9 billion.

At the outset of the restructuring process, the indebtedness of CGG Group was around $2.5 billion, with a debt characterized by a complexity linked to the diverse nature of its loan facilities, the geographic spread of the borrowers and the guarantees granted between various Group entities.
Discussions initiated in February 2017 in the context of an amicable procedure (voluntary arrangement) with the major creditors and shareholders of CGG had led to an agreement with the main creditors and one shareholder (DNCA), to be implemented under a *Sauvegarde* procedure opened on June 14, 2017. The Commercial Court of Paris then ratified the *Sauvegarde* Plan on December 1, 2017. The plan implementation phase was finalized in late February 2018, leading to a drastic reduction of the Group's debt, with the full bond-related debt (€1.7 billion) converted into equity.

This restructuring process involved numerous challenges, among which:

- Issues linked to cross-border coordination of the proceedings, since the location of the Group's assets pledged as surety to the benefit of creditors and on some loans required CGG Group to file for 14 different Chapter 11 procedures concurrently with the *Sauvegarde* procedure, along with a Chapter 15 recognition procedure.
- Issues linked to the bondholders (special treatment of high-yield bondholders whose bond issuance was governed by US law) and to the absence of creditors' classes under French law (vote of high-yield bondholders and holders of convertible notes within a single committee, and recourses initiated).
- Issues linked to the treatment of shareholders under French law, who retain their power of veto (and all the more so in a listed company) despite the sharply deteriorated enterprise value of an overleveraged company and the conversion into equity of virtually the entire bond debt (€1.7 billion) via a debt-to-equity swap.

The CGG case is truly a "textbook case": It is a unique opportunity to exchange views on the challenges encountered and on the legal and financial issues involved. In this context, a forum of discussions and exchanges was organized jointly by the EMEA regional section of International Insolvency Institute (III) and by the Cercle France-Amériques under the scientific chairmanship of Professor Jean-Luc Vallens.

Four topics were selected for this symposium:

- Coordination of US and French procedures in the judicial phase of the restructuring process

This first roundtable panel focused on differences between the US and French procedures, i.e. Chapter 11 and Chapter 15 on the one hand, and the French *Sauvegarde* procedure on the other hand. Judge Martin Glenn and Alan Kornberg[1] presented the Chapter 11 and Chapter 15 procedures. The experience shared by the company and its legal counsels about the opening and process of these procedures highlighted the complexity of monitoring these US procedures, with the judge playing an omnipresent role on a daily basis, in particular in controlling the payments and cash flow of the company. The benefit of the French *Sauvegarde* procedure was also stressed since – even though it is a judicial and collective procedure – it nevertheless enables a distressed debtor who is not yet insolvent, i.e. in payment default or *cessation de paiement*, to place itself under the protection of the Court while retaining full authority to manage its company, which was felt to be particularly suitable for the restructuring of CGG. The preliminary *Mandat ad hoc* phase during which the main negotiations took place, was most certainly a key stage for the preparation of the CGG "prepacked" Safeguard Plan. Thus, an analysis of the judicial outcome of the CGG case should not ignore the benefit of amicable preventive procedures which constitute one of the development priorities of the draft European Directive published on November 22, 2016.

- Membership and operation of Committees and Classes of Creditors

The second discussion panel presented two types of creditors' consultation processes: via committees formed according to the nature of the claims under French law, or via classes of creditors under New York State law, with classes of a more flexible composition enabling creditors with similar interests to be grouped together. While subordination agreements may now be taken into account under French law when determining the voting conditions applicable to a committee member creditor, the CGG case highlighted the need for more flexibility in the membership of such committees by affording preference to grouping creditors in similar situations, and determining the diverging interests of creditors who could therefore not be grouped into a same class. The class-based vote of creditors about a draft *Sauvegarde* restructuring plan or a turnaround plan is also among the proposals of the draft EU Directive. The pragmatism shown by the Judicial Administrator when defining the voting conditions for the high-yield bondholders was also stressed, due in particular to the highly speculative nature of these bonds and to the multiple contacts and bondholders involved.

- Restructuring of the high-yield bond debt

The specific features of a high-yield bond debt were reviewed in greater detail by the third discussion panel of this symposium dedicated to the CGG case. These high-yield bonds were issued by a French company but under an issuance contract governed by New York State law. The treatment of this debt therefore required CGG and its counsels to consider the coexistence of two legal systems: French law on the one hand to run the process of amicable and collective

[1] Company's legal counsel for US law aspects

restructuring procedures, and on the other hand New York State Law in compliance with the bond issuance contract. During the "amicable collective" arrangement phase, waivers had to be granted by the creditors. Such waivers are necessary to overcome the risk of an event of default due to the opening of a restructuring procedure[2], which could have resulted in an acceleration of the high-yield bonds and a demand for early redemption. In the CGG case, while the bondholders did benefit from some sureties on some of the Group assets, their claims were however subordinated to those of the Senior creditors who held guaranties and sureties on a major portion of the Group's assets. These diverging interests had to be taken into account during the negotiations, particularly since it was necessary to find an agreement with the high-yield bondholders as a full conversion of the bond debt into equity was a prerequisite for a sustainably viable restructuring of CGG.

- <u>The role of shareholders in restructuring a listed company</u>

The role of shareholders in the restructuring of a French listed company still keeps a major importance as compared with other legal systems, particularly the US legal system. This peculiarity of French law may have led some foreign creditors to be surprised at the role given to the shareholders in the CGG case. Some felt that the economic logic of a waterfall to distribute the value of an over-indebted company should lead to consider the shareholders' value as null, or even negative. The fourth roundtable panel therefore discussed the new provisions of Book VI of the French Commercial Code which, subject to numerous prerequisites, give the possibility of ousting a non-consenting shareholder when implementing a *Sauvegarde* or turnaround plan. However, the key role of a public sovereign shareholder was also addressed, in echo to the still-existing role and right of veto of shareholders under French law. The shareholders must necessarily be consulted whenever a *Sauvegarde* or turnaround plan is developed, if such plan generates changes in the capital structure. In the CGG case, the full conversion of the bond debt into equity did indeed generate such capital structure changes, but, according to some creditors and in particular foreign creditors, the strong dilution of the shareholders resulting from the debt-to-equity conversion no longer justified economically a prior consultation of the shareholders.

The issues raised in the CGG case were the subject of a dedicated one-day symposium. The views exchanged during this symposium can usefully fuel the investigations to be carried out in the context of a review of the draft EU Directive of November 22, 2016. It was thus found necessary to take into account the economic situations of the creditors of distressed companies, both in terms of consultation of Creditors Committees and of the role to be allowed to the shareholders of an overleveraged company.

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[2] Despite article L. 611-6 of the Commercial Code presuming the existence of unwritten clauses. The location of assets pledged as guarantee across all CGG Group companies required that no risk should be taken and a potential objection to the applicability of this article under New York State law required a comprehensive protection. During the judicial phase, the location of the pledged assets securing the high-yield debt, and the coexistence of the two French and US legal systems led CGG Group to open cross-border procedures (i.e. Chapter 11 and Chapter 15) in order to protect the pledged assets.

ORGANIZATION, RECOGNITION AND IMPLEMENTATION OF PARALLEL AND COORDINATED PROCEEDINGS IN FRANCE AND THE UNITED STATES

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I. Introduction

On February 21, 2018, less than nine months after commencing coordinated restructuring proceedings in France and the United States (among other jurisdictions), CGG S.A. ("CGG") and its affiliated chapter 11 debtors (the "Debtors," and together with CGG, the "Company") successfully implemented their global financial restructuring plan.[3] This achievement resulted from extensive preparation and coordination among the Company, an international team of advisors, and various stakeholders around the globe. In this paper, we describe some of the key considerations involved in planning the Company's multi-jurisdictional restructuring, and we highlight some of the hurdles the Company faced in bringing parallel and coordinated proceedings in France and the United States to a successful conclusion.

II. Pre-Filing Planning

A. Capital Structure and Jurisdictional Analysis

Before commencing its restructuring proceedings on June 14, 2017 (the "Commencement Date"), the Company had approximately $2.9 billion in principal amount of funded indebtedness, which consisted of:

- a secured multicurrency revolving credit facility, under which CGG was the borrower and each of the Debtors (other than those organized in Canada) was a guarantor (collectively, the "Guarantors");
- a secured U.S. revolving credit facility, under which CGG Holding (U.S.) Inc. ("CGG Holding") was the borrower and for which the Guarantors and CGG were liable;
- a secured U.S. term loan, under which CGG Holding was the borrower and for which the Guarantors and CGG were liable;
- unsecured high yield bonds (the "High Yield Bonds") issued by CGG and guaranteed by all of the Debtors; and
- convertible bonds issued by CGG (the "Convertible Bonds").

Because the obligors of the Company's funded debt were organized in various jurisdictions across the globe, a key consideration during the planning stage was determining the appropriate jurisdiction(s) in which to implement the restructuring. It was critical that the Company commence the proceedings in a forum that enforced a worldwide automatic stay, such as the United States. At the same time, however, because CGG's principal place of business, shareholders and other major

[3] The Debtor entities were 14 direct and indirect subsidiaries of CGG, organized in the United States, Canada, the United Kingdom, the Netherlands, and Norway. Each of the Debtors was an obligor under the High Yield Bonds (as defined herein), and all but two of the Debtors (the Canadian entities) were obligors under CGG's secured funded debt.

constituents were predominantly located in France, a restructuring effectuated entirely in the United States would not be prudent.

Accordingly, the Company commenced the following multi-jurisdictional proceedings: (i) CGG commenced a *procédure de sauvegarde*, or a "safeguard proceeding," in France and a case under chapter 15 of the Bankruptcy Code to recognize and implement the safeguard proceeding, (ii) the Debtors commenced chapter 11 cases in the United States, (iii) the Debtors organized in Canada commenced proceedings in Canada to recognize the French and U.S. proceedings, and (iv) a CGG affiliate that guaranteed the High Yield Bonds, but which was no longer an operating entity, commenced a liquidation proceeding in Australia.

B. DIP Financing and Cash Management Issues

Many companies that file for chapter 11 relief need additional financing to maintain operations over the course of the case. Such financing is commonly referred to as "DIP financing" and generally entitles the DIP lender to superior rights vis-à-vis prepetition lenders. The Company, however, had substantial cash on hand prior to commencing the restructuring proceedings. While the Company explored the idea of obtaining DIP financing (and such discussions continued during the chapter 11 cases), it was able to fund its operations during the restructuring proceedings by using cash collateral[4] rather than a new money loan.

The Company's cash management system, meanwhile, was the source of significant prepetition planning. Prior to the filings, the Company had a centralized cash management system that was managed by Debtor CGG Holding B.V., which served as the main cash pooling entity for substantially all CGG affiliates. To minimize the risk of cash being diverted from the Debtors for the benefit of non-Debtor entities, the Company restructured its cash pools in advance of the filings to ensure that the Debtors' cash pools would be separate from those of non-Debtors. Accordingly, the Company divided its cash management into four independent cash pooling perimeters—one for U.S. Debtors, one for foreign Debtors, one for non-Debtors, and a separate cash pool for CGG S.A., the sole group company in a safeguard proceeding. To minimize the risk of a liquidity shortfall, particularly in light of the Company's decision to not obtain DIP financing, the manager of the non-Debtor cash pool—CGG Services (NL) B.V.—would fund the chapter 11 Debtors to the extent that cash generated internally was insufficient to fund operations. The Company's modified cash management system was approved as part of the Debtors' "first-day" relief in the chapter 11 cases.

C. Timing Considerations

Instrumental to the timing of the restructuring filings was delaying the Commencement Date until the Company's restructuring plan had the support of its key creditor and shareholder constituents. Given the complexity of the potential restructuring efforts and the number of stakeholders involved, in February 2017, the President of the Commercial Court of Paris appointed SELARL FHB, and specifically Ms. Hélène Bourbouloux, as *mandataire ad hoc* to aid in negotiations between the Company and its stakeholders. Like a mediator in the U.S. bankruptcy context, a *mandataire ad hoc* does not have the ability to compel parties to reach agreement; instead, the *mandataire ad hoc* facilitates negotiations. Under the auspices of the *mandataire*, the Company reached an agreement

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4 "Cash collateral" in this context refers to internally generated proceeds of operations which are subject to the liens of prepetition lenders.

in principle on the terms of a comprehensive financial restructuring with (i) an ad hoc group of secured lenders, (ii) an ad hoc group of holders of the High Yield Bonds, (iii) a holder of the Convertible Bonds, and (iv) a significant shareholder of CGG with substantial cross-holdings in certain of the Company's funded indebtedness. These stakeholders entered into a lock-up agreement and a restructuring support agreement pursuant to which they agreed to support and vote in favor of the Company's restructuring plan. As a result of these extensive prepetition negotiations and, ultimately, the support commitments from the Company's creditors and shareholders, the Company was able to consummate its financial restructuring and emerge from the respective court proceedings expeditiously, avoiding delay and unnecessary expense.

Although various other factors influenced the timing of the Commencement Date, two particular factors are worth noting. *First*, a French entity can open a safeguard proceeding if it is in financial distress, but not yet insolvent. If the Debtors filed for chapter 11 protection before CGG commenced the safeguard proceeding, an argument may have existed that CGG was insolvent (and, thus, unable to utilize the safeguard) due to cross-default provisions in CGG's debt documents. To avoid this result, it was imperative that the Debtors filed the chapter 11 cases only after CGG commenced the safeguard proceeding. *Second*, and relatedly, a bankruptcy case in the United States is commenced immediately upon the debtor's filing of a voluntary petition for relief (or, in certain circumstances, the filing of an involuntary petition) with the bankruptcy court; in contrast, a French entity must file a request with the French court to commence a safeguard proceeding, and only after the French court enters an order granting such request is the safeguard formally "opened." Accordingly, the Debtors needed to have their chapter 11 petitions and "first-day" motions ready so that they could be filed on a moment's notice after the French court had entered the order opening the safeguard. On the Commencement Date, immediately upon entry of such order, CGG commenced its chapter 15 case with the bankruptcy court to recognize the safeguard proceeding and, minutes later, the Debtors filed petitions commencing the chapter 11 cases.

III. The Parallel and Coordinated Proceedings

As previously mentioned, because the reorganization envisioned a single financial restructuring for the Company, neither proceeding could stand alone. Instead, the chapter 11 cases were designed to work in tandem with the safeguard proceeding. The two restructuring plans thus shared many common elements, including providing the same treatment for the Company's secured lenders and unsecured bondholders. Under the parallel restructuring plans, the Company extended the term of its secured indebtedness, equitized approximately $2.0 billion of unsecured bond debt, and raised up to $500 million of new debt and equity financing. Importantly, all other creditors and parties in interest were unaffected. Specifically, the chapter 11 plan provided for the assumption of all of the Debtors' executory contracts and unexpired leases, and contemplated the payment in full in cash of all general unsecured creditors, together with interest, where applicable.

A. The Chapter 11 Cases

After filing a chapter 11 case, a debtor has the exclusive right to file a plan of reorganization for the first 120 days of the case, subject the court granting an extension of this right. After such period has expired, other parties in interest may propose a plan over the objection of the debtor. A court will not confirm a plan unless it complies with the numerous requirements of section 1129 of the Bankruptcy Code; most notably among them, a plan must be feasible, meaning unlikely to be followed by a subsequent liquidation or reorganization, and it must be in the best interests of creditors.

The road to plan implementation begins with filing and obtaining court approval of a disclosure statement that provides "adequate information" for parties in interest to make an informed decision to accept or reject a plan. The key exhibits to the Debtors' disclosure statement, such as a valuation analysis, liquidation analysis, and financial outlook, considered and analyzed the reorganized Debtors on an enterprise-level basis, together with the rest of the corporate family. On August 28, 2017, the U.S. court approved the Debtors' disclosure statement and authorized the Debtors to solicit votes on their plan. Solicitation began promptly after entry of that order, with votes due on September 22, 2017. Impaired creditors voted overwhelmingly in favor of the plan.

Finally, at a hearing on October 10, 2017, the U.S. court confirmed the chapter 11 plan – a mere four months into the chapter 11 cases. However, the effectiveness of the chapter 11 plan was conditioned upon, among other things, the French court's approval of the safeguard plan and the U.S. court's recognition and enforcement of the sanctioning order in the chapter 15 case. Therefore, the Debtors' could not emerge from chapter 11 or implement the confirmed plan until these final milestones were met.

B. The Safeguard Proceeding

During the chapter 11 cases and about a month after the safeguard proceeding had opened in June, with the support of its key creditor constituencies, CGG finalized a safeguard plan in France and distributed it to its creditors. On July 28, 2017, in accordance with French law, CGG convened meetings with both the credit institutions committee and the bondholders to vote on the safeguard plan. Both meetings resulted in a vote in favor of the safeguard plan that far surpassed the threshold requirement for approval of the plan.

Unlike in the United States where shareholders enjoy very few rights in a chapter 11 case, in France, the support of shareholders is in most instances a prerequisite to obtaining approval of a financial restructuring. CGG devoted substantial resources to obtain the support of its shareholders, including appointing an independent appraiser to consider the fairness of the restructuring, who ultimately concluded that, taken as a whole, the safeguard plan was fair to shareholders. On October 31, 2017, after the chapter 11 plan had been confirmed, CGG held a general meeting of its shareholders to vote on the resolutions necessary to implement the restructuring; however, the 25% quorum required under French law was not met. The meeting was reconvened on November 13, 2017 and, under French law, the required quorum for a second convening of 20% was satisfied. Ninety percent of those present at the meeting supported the restructuring, thereby exceeding the voting threshold of two-thirds in amount of those present. On November 20, 2017, the French court held a hearing at which CGG requested the court to sanction the safeguard plan. The French court heard oral arguments from CGG, a group of objecting convertible bondholders, and other key parties and, after ten days of deliberation, rendered an opinion which overruled the convertible bondholders' objection and found the safeguard plan satisfactory. On December 21, 2017, a hearing was held in the chapter 15 case regarding CGG's request for recognition and enforcement of the French court order sanctioning the safeguard plan, and the court entered an order recognizing and enforcing such order. The Debtors implemented their restructuring and emerged from chapter 11 on February 21, 2018.

Ultimately, through careful coordination among the multi-jurisdictional proceedings, the Company successfully implemented a global restructuring spanning four countries, three separate and intricate bankruptcy proceedings, dozens of complex issues, and nearly twelve months of hard work by the Company's principals and advisors to effectuate a single, integrated financial restructuring of the entire corporate group.

BUSINESS ORGANIZATION: DIFFERENCES BETWEEN FRENCH AND US PROCEEDINGS :

Sophie Barbe
Alix Partners

Safeguard is often presented as a chapter 11 « à la française », allowing a company to file for protection before insolvency. Like its US counterpart, it provides a fresh start to rehabilitate debts and operations. Nevertheless, in the daily practices, the two proceedings may be run differently. In chapter 11 cases, the debtors are under the control of a US Bankruptcy Judge who tightly monitors operations, authorizes certain activities, which mayeven require validation by secured creditors. On the other hand, in France, the proceeding is organized by a general legal frame under scrutiny of two insolvency practitioners, the judicial Administrateur and the Mandataire appointed by Court.

I From filing to ruling

1 preparation and filing

These organization rules structure the voluntary filing of each legal entity. The Safeguard request mainly consists of the company outlook, the events leading to filing and the rehabilitation prospects. It also includes an asset and liabilities situation assessing the absence of insolvency and P&L and cash forecast aiming at reassuring Court on ongoing business continuity. during the observation period.

In contrast, the data requirements for a chapter 11 filing are more significant. Closed to the French proceeding,1st day affidavit signed by a senior executive includes a description of the company operations, the events that led to the bankruptcy filing, any creditor or bank negotiations, a consolidated balance sheet and a list of top 30 to 50 creditors. But the heart of the filing are the 1st day motions, which request authorization to take steps to preserve the estate including authority to pay prepetition wages and benefits, to use existing cash management systems, to pay prepetition obligations due to critical and foreign vendors, to maintain insurance policies as well as to pay any prepetition taxes which are due, among other motions. These very specific motions are crucial for operating the business normally during the proceeding.

2 Key players of the proceeding

On both sides of the ocean, the key players are similar. Under both proceedings the debtor remains in possession operating the business in the ordinary course, but in a structure set up either by the U. S. Bankruptcy Code or by the Commercial Court, which forbids certain actions outside the ordinary course of business including disposal of assets. The directors' role is clearer under US law, since the debtor in possession has a duty to maximize the value of the bankruptcy estate.

Similarly, even if the Court is a collegial body in France compared to a single person in the US, in both case monitoring of the case is in under the responsibility of one judge, let it be the juge commissaire or the US Bankruptcy Court judge. Collective interests and law enforcement are ensured by the parquet in France and the Office of the US Trustee under chapter 11.

The main difference comes from the absence of a trustee in chapter 11 (contrary to chapter 7). In France, the Court appoints one Administrateur to sit beside the directors and one Mandataire to represent the creditors.

There is a difference between the two processes in how prepetition claims are determined. In a U. S. case, the debtors list their known prepetition claims in the Statement of Assets and Liabilities filed with the court approximately 30 to 60 days after the filing.

If a creditor disagrees with the debtors' filing, the creditor must file a claim to preserve their position. In France, the creditors, informed either by publicity or directly by the Mandataire based on the list prepared by the debtor, are finally responsible for lodging their claim.

The creditors' committees are run differently. Subject to a threshold, the French Creditors' committees are settled by law (bondholders, financials and trade creditors). Under chapter 11, the judge may approve committees to represent various classes of creditors and possibly equity holders.

Another specificity of the chapter 11 is the appointment by the debtor of a noticing agent in charge of an extensive publicity of all documents and decisions related to the chapter 11 proceeding, beyond the information provided by Court in France.

II Operating the business during observation period

1 running daily operations with key stakeholders

1.1 Creditors and subcontractors

Both proceedings provide for an automatic stay, in the form of a prepetition payment freeze or the suspension of lawsuits, and for the payment of post-petition claims, with some specificities in implementation.

The automatic stay takes place at a different stage, in France on the ruling date (12.00 AM) and at the filing date (12 :01 AM) for the chapter 11. This rule prevents any risk of lawsuit between the filing, the hearing and the ruling, at a time when the information made public is likely to be spread in the news or in the company environment.

Blocking points resulting from the stay can be lifted by the judge in charge, within the limits of the exceptions defined by law under safeguard (lien, provisional payment). whereas the US law accept the broader and more operational concept of critical vendor and enables prepetition claims payment if approved under the first day motions.

Post-petition, all claims are deemed payable under Safeguard. Under chapter 11, certain post-petition expenses such as professional fees are subject to the objection of creditors and must be approved by the court. All payments are hence frozen until the approval of cash management system in the 2nd day hearing decision.

Finally, both proceedings provide for an opportunity to terminate existing contracts. According to US law, the debtors identify all contracts in the Statement of Assets and Liabilities. Generally, at plan confirmation the debtor rejects unfavorable contracts. The French proceeding provides for an automatic continuation of contracts, subject to a different decision from the Administrateur or the Judge. Hence, in both cases, the debtor has an opportunity to restructure its P&L.

1.2 Employees

Employees' information is a major difference. According to French proceeding, the consultation of Employees' representatives is compulsory before any filing. They must also be informed on a regular basis during the case, as employees are considered a key stakeholder in the proceeding. These councils appoint a representative attending hearings and in charge of defending employees' interest throughout the proceeding. The US law is silent on this subject and the communication to employees or Unions is under the sole debtors' responsibility, depending on the company's habits and policies.

Another point of discrepancy between the two proceedings, wages claims in France receive a super privileged status and are guaranteed through the Wage insurance (AGS) whereas the American law grants limited privilege to employees.

Pre-petition employment claims receive priority treatment up to a cap of US$12,850 per employee. All amounts over that cap are considered a general unsecured.

2 Control over the proceeding

2.1 Control by court and proceeding officers

Under French law, the Judicial Administrator reports to the Court and organizes the reporting scheme with the debtor. As the company is not insolvent, the administrator usually acts as supervisor and ensures a posterior control over management action. He/she often carries out a monthly review on P&L and cash-flow actuals and forecast.

Under chapter 11, the debtor is required to file Monthly Operating Reports which generally includes schedules of cash receipt and disbursements, bank account information, payment to professionals, income statement, balance sheet, aging balances of receivables and unpaid post-petition debts.

Furthermore, 30 to 60 days after filing, each debtor files Statements of Financial Affairs (SOFAs) and Schedules of Assets and Liabilities (Schedules) which include balance sheet information, a list of all claims and contracts, and responses to 32 questions designed to give insight into business practices of the filing entities

Finally, every six months, the debtor files a financial report on non-debtor entities in which it holds a controlling or substantial interest.

2.2 Control by creditors

Under French law, only one to five voluntary creditors, both secured and unsecured, without any class reference, can be appointed by Court as controller to the proceeding. They aim at protecting general interests and hence can access undisclosed information.

Under chapter 11, secured creditors can play a specific part thanks to their security scheme. As soon as the cash is pledged to the lenders, the Debtor generally negotiates with secured creditors an "adequate cash protection agreement" with the creditors, to ensure they keep a control over their cash collateral during the proceeding. This agreement is validated by the Judge. Depending on the financial condition of the debtor, lenders often require adequate protection payments through payment of interest on the secured facilities, covenants on the use of cash and specific reporting in the form of a 13-week cash flow forecast with follow up and regular reforecasts.

As a conclusion, the day to day management of the Debtor is similar with a segregation of pre and post-petition claims, cash-flow forecast management, and a possible rejection of contracts. Identically, the two laws acknowledge the need for a judge validation of operations out of the normal course of business.

In practice, the main differences relate to preparation work and the proceedings control. In chapter 11, the operating scenario during the Observation Period is fully defined, which requires a significant work ahead of a filing by the Debtor and its advisors and also from the Secured Creditors benefiting from a pledge over the cash. In absence of a supervising trustee, the very structured and standardized reporting enables a follow up of this individual organization. This structure may appear strict compared to French practice, but is the very condition for the Debtor to be fully in possession.

COMPLEXITY OF THE ORGANISATION AND FORMATION OF CREDITORS COMMITTEES: CASE STUDY OF CGG SAFEGUARD PROCEDURE.

Jean-Pierre Farges,
Ashurst, Legal Counsel to the Judicial Administrator

CGG, a French flagship of geophysical and geological services listed on the stock exchange, operating on all continents and employing over 5,000 people worldwide, confronted to dozens of banking institutions and several hundred bondholders, with nearly 2 billion euros of debt written off and 500 million euros of new money injected: the financial restructuring of CGG in 2017 can probably boast of being THE *Sauvegarde* procedure of the decade.

The legal challenges raised by this unprecedented case proved up to par with an outcome that has no cause to envy the Anglo-Saxon insolvency procedures. The strategic choice of negotiating a restructuring plan with the creditors' representatives prior to the opening of the Safeguard (*Sauvegarde*) proceedings has enabled a plan to be adopted by the creditors less than 45 days only after the opening of the procedure.

In order to successfully reach this outcome, the *Administrateur Judiciaire* (Court-appointed Administrator) took over the task of organising the consultation of Creditors Committees in record time, and this was no simple task. Similarly to the *Eurotunnel*, *Thomson* or *Belvédère* cases, the CGG Safeguard procedure was a typical case of the law challenged by international finance.

Schematically, the CGG debt included revolving credit facilities and bonds or notes, some of which governed by US law (high-yield bonds). The bondholders were trading their notes on secondary markets in several countries, while the credit establishments had financed their own revolving loan via sub-holdings.

To make things even more complicated, the creditors had obtained, in the context of negotiations related to the draft Safeguard Plan, the retention of their right to trade their securities on the markets, until the implementation of the plan.

While the Administrator is tasked with organising the consultation of Creditors Committees, it should be noted that the legal texts are sometimes imprecise, or even unsuitable for this type of restructuring. How to take into account the traded debt securities? How to get bondholding creditors to vote when they are subject to a foreign law making a distinction between legal ownership and economic ownership? What voting methods should be adopted to take into account any potential sub-holdings owned by credit establishments?

The Administrator is then faced with making his/her own choices and decisions, and must undeniably show pragmatism. Yet, in a context where the possibility of recourses is omnipresent, the Administrator's choices involve a risk since they could fuel a major dispute after the plan is approved by the Court.

Complexity in forming the Committees

The first constraint quickly facing the Administrator in this type of large-scope restructuring process results from an often-neglected difficulty, which is not of a legal nature but is actually material. In the *Solocal* case, the Administrator had sent a total of over 75,000 pages of documents via nearly 300 international certified mail letters!

To remedy this problem, the CGG Administrator had innovated by convening the members of the Committee of Financial & Related Credit Institutions (*Comité des établissements de crédits et assimilés*, or CECA) by (i) sending the notice to convene to the Agents of the creditors, and (ii) via simple letters addressed individually. The draft plan and its annexes had not been attached, but rather was made available in an electronic data-room accessible on request as of the convening notice date. On the day when the notices were sent, a bailiff mandated by the Administrator had duly noted the notice sending date, the conformity of addresses shown on the envelopes against the list of addresses previously notified by the debtor, and the on-line publication of the draft plan. This pragmatic solution, meeting the goal pursued by the legal texts, deserves to be congratulated in my view.

From a more legal standpoint, the main difficulty for the Administrator regarding the formation of the committees was definitely the issue of their membership.

Regarding the membership on the CECA, Article L. 626-30 paragraph 2 of the French Commercial Code provides generally that credit establishments and related institutions, as well any creditor owning a debt instrument previously held by one of the above, are entitled to be a *de jure* member of the committee. Article R. 626-55 paragraph 2 of the code defines the related creditors ("*assimilés"*) in broad terms as being in fine "*any other entity with whom the debtor has entered into a credit operation"*. Some authors have remarked that the lawmaker was targeting the operation rather than the operator[5].

In the CGG case, the question was whether the guarantor subsidiaries should be *de jure* members of the CECA as "related" parties (*assimilées*). Some judges are known for accepting that a company belonging to the same group as the debtor could be a member of the CECA whenever they have placed remunerated funds at the disposal of the debtor[6]. In the CGG case, the subsidiaries had granted guarantees to secure the revolving loans and the high-yield bonds. Yet, these guarantees could be analysed as "on signature" credit transactions. Since the above-cited Article R. 626-55 does not rule out this type of credit operation, the obvious deduction was that the guarantor subsidiaries were *de jure* members of the CECA. Which led to the possibility for these subsidiaries of voting based on the amount of their potential guaranteed claims. Yet, because not only were the total claims of CECA members guaranteed but the high-yield bond debt was also guaranteed, the

[5] F. Pérochon, *Entreprise en difficulté*, LGDJ 10e édition, n° 913 ; P.-M. Le Corre, *Droit et Pratique des Procédures Collectives*, Dalloz Action 9e édition, n° 513.22.

[6] Court of Appeal of Paris, 11 May 2016, RG n° 16/03704.

risk was to alter significantly the balance of power within the CECA in favour of the debtor who would end up having the theoretical possibility of dictating its own Safeguard plan with the support of its subsidiaries. While this theoretical – and counter-intuitive – difficulty emerged at the stage of defining the CECA membership, in practice it was resolved at the stage of determining the voting conditions on the committees (see below).

That being said, it is not up to the Judicial Administrator to decide the membership itself of the committees. Indeed, while Article L. 626-30 of the Commercial Code provides that "*The composition of committees shall be determined in respect of claims arising prior to the commencement order for the proceedings*", the Administrator actually uses as a basis the list of claims forwarded by the debtor on commencement of the proceedings. In the strict sense of the term, the lawmaker has provided for the principle of a certified list only for the suppliers, but stays silent about the credit establishments[7]. It is however possible to regard this omission as a legislative imprecision rather than a genuine intention by the lawmaker to treat credit establishments differently. Thus in practice, the CGG Administrator asked the company and its statutory auditors to draft a list of claims applicable to the CECA members.

Regarding the issue of the date used to assess the capacity as member on the committee, it should be noted that the Administrator has to compromise with imprecise legal texts. A first mistake would be to seek the answer in the claim submission. Indeed, the capacity as committee member does not presuppose that the claim has been filed, if only because a foreign creditor could be requested to vote in the committees (vote which must take place within 6 months after the opening of the procedure[8]) even before his own deadline to file his claim has expired[9].

The solution actually involves a combination of Articles L. 626-30-1, R. 626-57-1 and R. 626-58 of the Commercial Code. Based on these articles, it should be deduced that, in order to take part in the vote, it is sufficient to own an eligible claim at the latest eight days prior to the voting date. Consequently, in the event of debt trading, it is mandatory and sufficient for the notification of the transfer to the Administrator to take place at the latest eight days prior to the vote, via a notice sent by registered letter with acknowledgement of receipt. This solution is warranted by a technical constraint, namely that past this date, the Administrator simply can no longer take into account any debt transfer since the voting conditions have already been defined.

Complexity in organising the vote.

The doctrine has sometimes qualified the issue of vote organisation by the Administrator as the "*kingdom of the arbitrary*"[10]. It is true that the Administrator is granted special powers in this respect. In a concern for flexibility, the lawmaker has indeed left the Administrator free to define the voting process and method of vote casting. The complexity then results from the choices open and to be quickly decided by the Administrator.

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7 Articles R. 626-56 of the Commercial Code and R. 626-55 of the Commercial Code.
8 Article L. 626-34 of the Commercial Code.
9 Article R. 622-24 of the Commercial Code.
10 P.-M. Le Corre, *Droit et Pratique des Procédures Collectives*, Dalloz Action 9e édition, n° 513.42.

The important point is ultimately to comply with a few guiding principles that constitute best practices, failing a reliance on appropriate texts: (1) The rules of the game must be known by all creditors members of the committee (in practice, it is recommended to draft internal rules of procedure to be communicated to all committee members along with the notice to convene); (2) These rules must be objective and legally justifiable; (3) The rules must apply to all creditors who are in an objectively identical situation; and (4) The rules may not be modified during the voting process, i.e. once the first ballots have been received.

In the CGG case, some of the credit institutions members of the CECA had financed their revolving loans via sub-holdings. They had then asked the CGG Administrator for the possibility of splitting their vote on the committee in order to take into account any potential voting instructions from their sub-holders. Since nothing stood in the way, the Administrator had authorised in the rules of procedures that each member could fill out, under their own responsibility, two voting ballots, one representing the fair quota of sub-holders favourable to the plan, and the other representing the fair quota of sub-holders opposing the plan. As a precautionary measure, the Administrator was thus avoiding that CECA members might vote against the plan on behalf of their entire claim for fear of a recourse by a non-consenting sub-holder.

Independently of the vote organisation, the Administrator is also entitled to broad powers in terms of calculation method for the voting rights. These powers are granted by Articles L. 626-30-4 paragraph 4 and R. 626-58 paragraph 2 of the Commercial Code which substantially grant to the Administrator the authority to modulate the weight of some creditors when calculating the majority in order to take into account any potential voting agreements or subordination agreements.

While part of the doctrine may have "*viewed this power as extremely negative*"[11], it is however true that the flexibility given by the lawmaker, both in terms of vote organisation and calculation of voting rights, can sometimes prove decisive. The CGG case attests to this in two ways.

The first example addresses the vote of the CGG guarantor subsidiaries on the CECA committee. Their capacity as members granted by way of their guarantees theoretically gave them the option of voting based on the total amount of their potential guaranteed claims, and therefore the power to fully reverse the balance of power (see above). In order to resolve this issue, the Administrator referred to Article R. 626-88 paragraph 2 to consider that, eight days prior to the vote, the total tax-inclusive amount calculated for the claims held by these subsidiaries was actually equivalent to zero, since on that date the guarantees had not yet been called, and therefore the guarantor subsidiaries still did not have any possibility of subrogated recourse against CGG. As a result, no voting rights were granted to the guarantor subsidiaries. This empirical solution helped avoid a counter-intuitive solution – although made possible by the legal texts – that would have enabled the debtor to impose its Safeguard Plan due simply to the fact that its subsidiaries had acted as its guarantors.

[11] P.-M. Le Corre, *Droit et Pratique des Procédures Collectives*, Dalloz Action 9e édition, n° 513.42.

The second example relates to the organisation of the voting conditions at the CGG Bondholders Single Committee (*Assemblée unique des obligataires,* or AUO). In this case, the complexity derived from the voting process for high-yield bondholders and their necessary representation (it would have been inconceivable to have several hundred or even thousand bondholders travel to France). However, the rules of representation under US law, both for claim filing and voting of the committee, differ substantially from the rules applicable under French law – the existing requirements being much more restrictive in French law. It is true that in principle the rules of procedure for the AUO committee depart from the contractual rules under ordinary law, meaning that, while the bondholders were in principle subject to US law, they nevertheless had to adjust to the constraints of the French collective proceedings. The Judicial Administrator could not however ignore entirely the specificity of these obligations, at the risk of jamming the process and ending up with a negative "precautionary" vote.

While from a legal standpoint the legal bondholders were entitled to a voting right, these legal owners, in accordance with their own internal rules, had to request the opinion of their clearing houses – the so-called direct participants – who in turn had to question their economic owners – the so-called beneficiary holders. Because of this complex mechanism, the result was that the calculation agent alone has sufficient visibility to report faithfully on the voting instructions. With the unanimous consent of all stakeholders (debtor, representatives of the main creditors and calculation agent), the Administrator incorporated these constraints into the AUO internal rules of procedure, with an appendix describing the voting process and providing for so-called "omnibus" proxy mechanisms with justifying evidence to be attached, so as to ensure a faithful transcription of the bondholders' vote. In the absence of this flexibility granted to the Administrator to organise the vote, this constraint could have proven crippling for the process.

Classes of creditors: Toward a simplification of the law?

As attested by the latest reforms, it is clear that a simplification of the law is the goal to be reached. At a time when the French government is preparing to reform insolvency law to allow for the emergence of classes of creditors, the question is whether this reform will truly be a source of simplification or instead of complexification of the law. It should indeed be noted that, as related to their costs that are sharply lower than in other countries, our French insolvency proceedings are already very effective. While an improvement still remains conceivable, we should be careful that this balance does not end up being disrupted by the introduction of new mechanisms inspired from Anglo-Saxon law.

From the perspective of the new burden of responsibility imposed on the *administrateurs judiciaires* as insolvency trustees, it is likely that the emergence of classes of creditors will not be per se a source of simplification, quite the opposite. Indeed, by multiplying the categories and sub-categories of creditors, it could be feared that the choices that the Administrator has to make might also be multiplied accordingly. Which criteria should be chosen to group the creditors into classes? Could the voting conditions for some classes differ from others in order to take on board some specific constraints? It will be the lawmaker's task to introduce at least some examples of objective criteria in order to enlighten the insolvency practitioner.

We can only hope that the upcoming reform will be an opportunity for the lawmaker to provide the precisions that are currently lacking. *De lege feranda*, it is suggested for instance to introduce the principle of a certified list for CECA members, similarly to what is already expressly specified for suppliers, and to prohibit the transfer of claims less than 8 days prior to the vote of the relevant committee. The lawmaker could also seize this opportunity to introduce a dose of objectivity in the Administrator's powers to modulate the voting rights. This would lead to a greater legal security, both for the debtor and for the creditors, as well as for the stakeholders in the procedure who would then have more time to devote to the turnaround of the company.

FRENCH "*COMITÉS*" VS. US CREDITOR CLASSES: CLASSIFICATION OF CLAIMS AND VOTING PROCESS FOR SENIOR CREDITORS IN FRENCH AND US RESTRUCTURING PROCEEDINGS

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By definition, the aim of senior creditors is to seek a priority of payment or recovery over junior creditors. The main issue that senior creditors face in the context of court-monitored restructuring proceedings is thus to ensure that the debt-restructuring plan takes into account the preferential status of their senior claims, including where such seniority is purely contractual (and does not therefore result from statutory provisions).

In this respect, the ranking between senior and junior claims arises equally in the particular framework of the creditors' consultation on the draft restructuring plan, i.e. through the set-up of "*comités*" of creditors under French law or through creditor classes under US law. Indeed, the priority of repayment of senior claims must be taken into account at the time when creditors are consulted to vote on the draft plan in order for such plan to comply with the ranking of claims agreed upon between certain categories of creditors. How are those issues dealt with in the context of French safeguard or rehabilitation proceedings and US Chapter 11 proceedings?

First, it should be reminded that the concept of "*comités*" of creditors was introduced in France by law n°2005-845 of 26 July 2005, which was extensively inspired by the Chapter 11 of the US Bankruptcy Code and its concept of creditor "classes". However, and right from the beginning, the French legislator did not intend to implement a literal transposition of US concepts into French law, and fundamental differences between the two systems still have to be highlighted.

In that respect, and despite their apparent similarity, the US Bankruptcy Code and the French insolvency law provide in reality for two different systems to classify creditors in view of their consultation on the plan. Hence two different ways of dealing with the status of senior claims, since the ranking of creditors invited to vote on the plan is in fact taken into account at different stages of the process. Three chronological steps should be analyzed: the classification of claims through French "*comités*" or US classes (1), the vote on the draft plan (2) and the confirmation of such plan by the court (3).

1. Rigidity vs. flexibility of the rules pertaining to the classification of claims

The main difference between the US and the French systems occurs right at the moment of the classification of claims for the set-up of "*comités*" or creditor classes: whereas the provisions of the US Bankruptcy Code are characterized by their flexibility (a), French rules impose a more rigid framework (b).

a. Creation of homogeneous classes of creditors according to their situation under US law

Chapter 11 proceedings are usually characterized by their flexibility, in particular in the way creditors' claims are classified, whether in terms of number of classes of creditors that can be set up under the plan or in their actual composition. Indeed, the aim is to create groups of creditors taking into account their respective situation into "homogeneous" classes[12], in order to provide, in the plan, for uniform treatment within each class.

This system has several advantages. It allows the classification of claims to reflect at best the structure of the debtor's indebtedness[13]. From the creditors' point a view, it also ensures that claims in substantially similar situation shall be treated equally in the plan, i.e. that creditors sharing same rights, and consequently, same interests cannot be treated disparately. In this structure, the preferential status of senior creditors is thus taken into account when claims are classified, making it possible to isolate, right from the beginning, junior from senior creditors.

b. Statutory set-up of two "*comités*" and one bondholders' group under French law

By contrast, the French bankruptcy system distinguished itself from the US Bankruptcy Code by defining tighter rules pertaining to the classification of claims. In this respect, both the number of "*comités*" to be arranged and their actual composition are fixed by statute and determined according to the sole criteria of the creditor's identity[14].

This framework has the merit of its foreseeability, but it prevents "*comités*" to mirror the reality of the debtor's indebtedness. The same "*comité*" may accordingly gather creditors which do not necessarily share the same economic rights and which may have, as a consequence, diverging interests, or even fundamentally opposed strategies. In that respect, in the CGG's restructuring, holders of High Yield Notes, benefiting from guarantees issued by different companies of the group, voted in the same bondholders' group as holders of "OCEANE" notes, whose only obligor was the holding company CGG SA.

In certain cases, those rules can in practice lead to the set-up of a "*comité*" comprising only junior creditors with a *de facto* veto right over the draft plan (especially where, for example, mezzanine bonds are issued as part of a structured financing). This actual isolation of subordinated creditors does not appear to have been intended by the French legislator, and turns out consequently uncontrolled, as it gives to subordinated creditors, mechanically, a political leverage far out of proportion with their economic rights failing any concept of cram-down under French law.

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[12] The criteria used is the substantial similarity of the claims within a class, 11 U.S.C §1122 (a)

[13] See B. Soinne, « Réalisme et confusion (à propos du projet de loi réformant le droit des procédures collectives) », D. 2004, p. 1506, for a simplified list of classes which could be arranged

[14] That is, a first "*comité*" comprising financial institutions or assimilated (art. L. 626-30 C. com.), a second one gathering major trade creditors for which, and only for which, is also taken into account the quantitative criteria of the claims' amount (*ibid.*), and, as the case may be, the bondholders group which, *de facto*, acts like a third "*comité*" (art. L. 626-32 C. com.)

2. Voting process and majority rules applicable to French "*comités*" and US classes of creditors

Voting conditions and majority rules are the logical result of the previous step of the process: the US system essentially distinguishes between voting and non-voting classes (a), whereas, in the French system, it is at this moment of the voting process that the preferential status of senior creditors may be taken into account (b).

a. Determination of voting rules within the classes of creditors under US law

The voting rights of each class of creditors essentially derive from the classification rules and the creation of homogeneous groups of creditors with substantially similar rights.

First of all, the US Bankruptcy Code determines which class(es) of creditors shall be invited to vote on the draft plan. Only impaired classes are entitled to vote, that is to say classes of creditors receiving some recovery, but not a full recovery, and whose rights are thus affected by the plan[15]. Unimpaired classes, that is to say classes of creditors whose situation is not altered by the plan, are automatically presumed to accept the plan[16]. Conversely, classes that do not receive any recovery at all are deemed to automatically reject the plan[17]. As a result, only classes that are really impacted by the plan take part in the voting process, which mainly prevents any artificial blocking strategy.
Once classes invited to vote on the plan are determined, the US Bankruptcy Code provides for a double-majority rule: a class of creditors is deemed to accept the plan if creditors that hold at least two-thirds in amount and represent more than one-half in number of those voting approve, or vote in favor, of such plan.

b. Ability to take into account the preferential status of senior claims through the vote of French "*comités*"

Under French law, the preferential status of senior creditors over junior creditors (and, consequently, their different economic rights) are taken into account when the creditors "*comités*" are invited to vote on the draft plan (and not, as in the US, when classes of creditors are set up). It is therefore on a one-to-one basis, creditor by creditor, that particular voting rules are to be determined.

First, as is the case in the framework of Chapter 11 proceedings, the vote of so-called "unimpaired" creditors, i.e. those creditors which rights are not altered by the plan, is neutralized[18]. Then, for each "*comité*" (including the bondholders' group), the vote shall take place according to a simple-majority rule (two-third majority in amount of voting creditors within each class[19]). However, unlike in the US system, subordination agreements are to be taken into account when

[15] 11 U.S.C §1124
[16] 11 U.S.C §1126 (f)
[17] 11 U.S.C §1126 (g)
[18] Art. L. 626-30-2 al. 5 and L. 626-32 al. 3 C. com
[19] Initially, the law n°2005-845 of 26 July 2005 provided for a double-majority rule, inspired by the US Bankruptcy Code, but the majority in number was deleted by ordinance n°2008-1345 of 18 December 2008

voting rights of creditors within each class are computed by the court-appointed insolvency officer ("*administrateur judiciaire*")[20].

This solution was introduced in 2014 in order to deal with subordination at the time when creditors are consulted on the draft plan. In practice however, some practitioners have criticized this solution, pointing out notably its lack of predictability as the criteria to be used to determine the computation of voting rights are not clearly expressed. Above all, this system only enables to deal with one type of subordination, which may be named intrinsic subordination[21] (i.e. the subordination between creditors voting within the same "*comité*") by giving to senior creditors the opportunity to outweigh and therefore "cram-down" junior creditors. In a nutshell, this solution aims at reducing the political weight of junior creditors, voting within the same "*comité*" as senior creditors, to a level which is viewed as more representative of their economic rights, without entirely depriving those creditors from their voting rights[22].

This mechanic does not however offer a solution applicable to "extrinsic" subordination, which is the case when senior and junior creditors are voting in separate classes, i.e. different "*comités*" (including the bondholders' group)[23]. In this respect, the bondholders' group does not have the ability to modify the draft plan approved by the two other "*comités*": the bondholders' group as a whole only can approve or reject the plan. *De facto*, since each of the "*comités*" (including the bondholders' group) must approve the plan, subordinated bondholders, when isolated into a separate voting group, are offered a form of veto right on the plan, and thus an additional negotiation leverage in contradiction with the subordination provisions that were contractually agreed upon prior to the opening of restructuring proceedings.

3. Confirmation by the court

Both in US and French proceedings, the plan accepted by the "*comités*" or classes of creditors is subject to final court approval, but with different outcomes: if the US court may confirm a plan which has not been unanimously accepted by all impaired classes (a), this power is not yet offered to the French court (b).

a. The ability to impose a craw-down on dissenting classes under US law

With a view to protecting senior creditors' rights, the US Bankruptcy Code enables the court to confirm a reorganization plan even though such plan has not been unanimously accepted by all impaired classes, and thus to impose the plan on dissenting classes.

Naturally, this so-called cram-down is subject to several conditions. Notably, it is required that the plan be accepted by at least one impaired class of creditors[24], and that the absolute priority rule be complied with, that is to say that the plan can only be imposed to a dissenting class as long as this

[20] Art. L. 626-30-2 al.4 C. com., amended by ordinance n°2014-326 of 12 mars 2014

[21] It also has been called « vertical » subordination, see L. Le Guernevé et N. Morelli, « Les nouveaux enjeux des comités de créanciers, *Cah. dr. entr.* n°4, juil. 2011, dossier 21

[22] M. Houssin, "Pour une consécration de la subordination de créance par le Code civil", BJE janv. 2018, n°1, p.67

[23] *Supra.*

[24] 11 U.S.C § 1129 (b)

class receives the full present value of its claims, or that no lower-priority class receives anything on account of its claims[25], it being added that, in any case, any payment received by a class of creditors as part of the plan cannot be less than the amount that would be so received in a Chapter 7 liquidation.

This ability offered to the court is particularly interesting for senior creditors, as it neutralizes the political weight of junior creditors which are, logically, isolated into a separated class. In this view, senior creditors can have the court impose a plan which complies with their preferential senior status to dissenting junior creditors. The reverse situation is however impossible, because of the absolute priority rule, which prevents a plan that does not comply with the subordination or ranking of claims to be imposed by a class of junior creditors to a dissenting class of senior creditors.

b. Absence of any inter-class cram-down mechanism under French law

French law also provides that the court shall ultimately confirm the plan that was approved by the "*comités*" including, as the case may be, by the bondholders' group. The role of the court is notably to ensure that the interests of minority dissenting creditors are adequately protected[26], The French insolvency law however does not allow any inter-class cram-down and the court cannot impose a plan to a dissenting "*comité*" (including the bondholders' group) when such "*comité*" rejected the draft plan at a two-thirds majority.

In the case of a bondholders' group composed, in majority, by junior creditors, while senior creditors vote in the financial institutions "*comité*", French bankruptcy law does not allow the court to impose a plan without the acceptance of the bondholders' group at a two-thirds majority.

In conclusion, although the French system provides for the consultation of creditors through "*comités*" and is to a certain extent similar to the system of creditor classes under Chapter 11 of the US Bankruptcy Code, those two systems remain fundamentally different from the senior creditors' perspective.

The prospective reform of French insolvency laws, initiated by the proposal for a Directive dated 22 November 2016 and published by the European Commission[27] should qualify this statement: inspired by German insolvency laws, which incorporated some of the mechanisms defined in Chapter 11, the proposal for a Directive provides for the arrangement into homogeneous classes of creditors and the possibility to impose on dissenting classes a reorganization plan that was accepted by one class of creditors only, subject to certain conditions similar to those provided for in the US Bankruptcy Code.

[25] *Ibid.*
[26] Art. L. 626-31 C. com.
[27] Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. Most legal scholars tend to consider consider that its scope should exclude French standard safeguard but would cover the opening of conciliation proceedings followed by pre-packaged expedited financial safeguard or expedited safeguard

LEGAL REMEDIES AGAINST CREDITOR COMMITTEES' ORGANISATION AND DECISIONS UNDER FRENCH LAW

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The French Safeguard Act of 2005 purported to modernize the French insolvency framework. Inspired by the American Chapter 11, its key innovation was the creation of a majoritarian system of agreement to the restructuring plans by three creditor committees (credit institutions, major suppliers and bondholders).

Of course, such a majoritarian mechanism led to challenges from minority stakeholders that feel aggrieved. This was the heart of the CGG case: although more than 90% of bondholders had voted for the plan, some holders of convertible bonds (OCEANE bonds) petitioned the court to strike it down, deploring their unfavourable treatment compared to the treatment of the majority high yield bondholders.

The Paris commercial court held that the dissenters' claim against the restructuring plan was not admissible. As the decision by the Paris court of appeals is eagerly awaited, let us provide a briefing regarding the remedies available against the organisation and decision creditor committees under current French law.

I. REMEDIES PRECEDING THE CREDITOR COMMITTEES' VOTE ON THE PLAN

Not every safeguard proceedings require the organization of creditor committees. Articles L. 626-29 and R. 626-52 of the French commercial code indeed provide that the implementation of committees is mandatory for debtors which accounts are certified, and which have either 150 employees or a 20-million € turnover.

Below these thresholds, the implementation of committees is at the judge's discretion. The judge may indeed authorize the constitution of committees and appoint if necessary an administrator to actually organize the committees. This judiciary authorization is not subject to any remedy by creditors, as it qualifies as a measure of justice administration (*mesure d'administration de la* justice) pursuant to Article R. 626-54 of the French commercial code.

It may well be different with respect to the administrator's decisions organizing the committees under Articles R. 626-53 et seq. It is indeed debated whether a creditor may challenge the administrator's decisions on the ground of the rules governing the apportionment of creditors among the committees.

Neither the code nor the doctrine have provided a clear-cut answer. On the one hand, absent specific rules, Article R. 621-21 may certainly serve as a legal basis to such a challenge[28]. On the other hand, allowing such actions may jeopardize the efficiency of the whole system[29].

German law seems to provide a balanced solution. § 231 of InsO states that the constitution of creditor classes may be subject to challenges. Thus, in the event of a breach of the rules governing the constitution of classes, the court may reject the plan. However, to preserve efficiency, it also provides that the plan may only be rejected within two months from its presentation. This may be an interesting solution in the event of a reform of French law.

Once the committees have conferred and the plan is adopted, have creditors legal remedies to challenge the plan, as the OCEANE holders intended in the CGG case?

II. REMEDIES FOLLOWING THE CREDITORS COMMITTEE VOTE ON THE PLAN

Article L. 626-31 of the French commercial code states that where the draft plan has been adopted, the court shall ensure that the interests of all the creditors are sufficiently protected. One could thus think that this gives a remedy for dissatisfied creditors against the plan.

However, case law made clear that this article must be read in conjunction with Article L. 626-34-1. The latter does grant creditors a remedy against the plan, but also strictly delineates the scope of such challenge.

Article L. 626-34-1 of the French commercial code was adopted with a view to increase the efficiency and timeliness of the system. It aims at ensuring a quick implementation of the plan, in the interest of all the stakeholders. A report to the French Presidency regarding Ordinance n° 2008-1345 of 18 December 2008 (that inserted this remedy in the commercial code) (section II-4, last paragraph) clearly express the objective of the provision as "*avoiding that the use of legal recourses excessively delay the adoption of the plan*".

So how does Article L. 626-34-1 organize the challenges against the plan?

The article provides that « *the court shall rule in the same decision on disputes relating to the application of Articles L. 626-30 to L. 626-32 and on the definition or amendment of the plan. Creditors may only dispute a decision of the committee or the meeting to which they belong.*" Hence, there appears to be two limits to the possibility to challenge the adopted plan.

First, the article limits challenges by allowing creditors to challenge only decisions made by the committee to which they belong. The general notion of standing (*intérêt à agir*) fully justifies this

[28] V. G. Brémond et E. Scholastique, Réflexions sur la composition des comités de créanciers dans les procédures de sauvegarde et de redressement judiciaire, JCP E 2006, 1405, p. 466, pt. 34.

[29] V. J.-P. Rémery, L'appel dans la loi de sauvegarde des entreprises, JCP 2008. I. 103, no. 19.

solution. Pierre-Michel Le Corre even considers that this solution would have been the same absent a specific text, on the ground of the rules of general civil procedure[30].

In the same vein, creditors must also have suffered a personal harm. With respect to bondholders, Article L. 228-54 of the French commercial code grants the bondholders' representative a monopoly to engage "*actions intended to defend the common interests of the bondholders*". It should be noted that Article L. 228-83 adds that « *in the event of a judicial restructuring order or winding-up proceedings of the company, the representatives of the body of bondholders are authorised to act on the body's behalf*".

The second limit Article L. 626-34-1 contains relates to the subject-matter of the challenge. Only a breach of provisions of Articles L. 626-30 to Article L. 626-32 may indeed give rise to challenges. Authorities note in that respect that "*Articles L. 626-30 to L. 626-32 of the code set out the rules governing the composition of creditor committees, voting calculations, voting delays, as well as the rules governing the vote of bondholder assemblies. Hence, challenges must relate to the composition and the functioning of creditor committees et bondholder assemblies*"[31].

Case law agreed that potential challenges are circumscribed to certain matters. The Paris court of appeals thus held in the *Ludendo* case that: "*the legislation has granted tribunals stating on the plan, in the event of challenges, specific jurisdiction to rule on the capacity of creditor of members of committees, on the nature of their claims, in order to verify whether the creditor, the presence of which is challenged, should actually be part of the credit institutions committee, and on the value of his claim, from which its voting rights derive*". The court further concludes that: "*this regime, which merely aims at verifying the functioning of creditor committees, has no consequence on the subsequent procedure for the admission of claims by the judge*"[32].

In the *Thomson-Technicolor* case, the Versailles court of appeals ruled that the individual challenge by holders of "super-subordinated" bonds in relation to the amount of their voting rights was admissible[33].

The Paris commercial court's decision in the *CGG* case held that OCEANE holders' claim against the merits of the plan adopted by the bondholder committee was inadmissible. This is in line with previous case law. Indeed, as provided for in Article L. 626-34-1 of the commercial code, bondholders would have been admitted to individually challenge the voting conditions within the committee. But they had not legal ground to engage individual actions to challenge their treatment under the plan.

Creditors may not challenge stipulations of an adopted plan. Thus, the judge must merely control the validity of the voting conditions. A control by the judge of the merits of the plan would be contrary to the spirit of negotiation and majority, thus distorting the law.

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30 V. P.-M. Le Corre, Droit et Pratique des Procédures Collectives, Dalloz, 9th ed., no. 513-43.

31 P.-M. Le Corre, *ibid.*

32 CA Paris, 11 mai 2016, n° 16/03704, *Ludendo*

33 CA Versailles, 18 nov. 2010, 10/01433.

Other countries' legislations widely prioritize such principles of negotiation and majority.

The English judge for instance shows a great deference towards the adopted plan, as the notion of "*unfair prejudice*" set out in § 38 of the 2000 Insolvency Act is restrictively construed.

It is noteworthy that the draft directive of 22 November 2016 is inspired by the German and American frameworks. To put it simply, in these countries, the judge may analyse the content of the plan to verify its compliance to two main principles: the best interest of creditors (under which no creditor under the plan must be in worse situation than in a no-plan scenario) and the absolute priority rule (under which no creditor with a claim or interest that is junior to the claim of the dissenting creditor may retain or get anything under the plan).

Under German law, creditors are ranked into classes, depending mainly on the seniority of their claim. German law offers the possibility to impose a plan not only to minority stakeholders within each class (cram-down) but also to dissenting classes of creditors (cross-class cram-down)[34].

In a simple cram-down scenario, which may be compared to the OCEANE holders' challenge within their committee, the court does not verify *ex officio* whether the plan is compliant with the best interest of creditors. However, dissenting creditors may report a breach of this principle, at the latest at the time of the vote. Dissenters bear the burden of proof, i.e., in particular, they must bring evidence establishing the liquidation value of the business.

The situation is more complex when it comes to cross-class cram-down. The court must verify *ex officio* the compliance with both the best interest of creditors and a principle of appropriate spread of the value under the plan. Here again, the anchor value is the liquidation value, but it may also be the market value in the event a sale of the business appears to be possible. The test of appropriateness of the spread of the value requires that the tribunal verify the compliance with a set of five rules: 1. No creditor may receive a value higher than the value of his claim; 2. Subordinated creditors and shareholders may not receive anything before more senior creditors receive the full value of their claims; 3. Pari passu creditors must be equally treated under the plan; 4. Shareholders may not receive a value higher than the value of their shares; 5. Shareholders must be equally treated under the plan.

In any event, it should be noted that the plan usually provides for a saving clause (*salvatorische Klausel*) together with a reserve funds, ensuring indemnification of creditors suffering from a breach of their best interest. In a cram-down situation, the court may refuse to approve the plan if the quantum of the reserve is deemed insufficient. The court otherwise approves the plan, and any challenges are considered common tort claims to be brought before the appropriate courts.

The absence of such possibility to obtain damages without the plan being struck down seems to be a loophole in the French framework. This ensures both the preservation of creditors' rights and the

[34] R. Dammann et M. Sénéchal, Le droit de l'insolvabilité internationale, Lextenso, 2018, no. 2276 et s.

continuation of the undertaking. It is unfortunate that French law gives the judge an either-or choice between approving or rejecting the plan as voted.

Finally, at the confirmation hearing, the court may neither amend nor supplement the plan. Like under French law, German courts only control the regularity of the vote and the apportionment of creditors among the classes. Creditors may challenge the confirmation judgment. Such challenge has a suspensive effect. The party challenging the plan bears the burden of proof and the challenge is admissible only if it is shown that the reserve provided for under the plan is inadequate.

HIGH YIELD DEBT RESTRUCTURING IN FRANCE

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The restructuring of the CGG Group, the world leader in geophysical services and equipment, whose gross financial indebtedness amounted to more than USD 2.8 billion, including circa USD 800 million of guaranteed and secured bank indebtedness, USD 400 million of unguaranteed and unsecured convertible bonds and USD 1.5 billion of guaranteed and unsecured high yield bonds, was the largest one in France since the Eurotunnel case. High yield bonds, which amounted to more than 50% of CGG's financial indebtedness, are usually governed by indentures, standardized New York Law documents, in particular when they are registered with the SEC (allowing a public offering in the United States) and must then comply with the provisions of the US Trust Indenture Act of 1940, as it was the case for CGG.

The restructuring of CGG, a group listed in France and in the United States, which implied the coordinated opening of safeguard proceedings at the level of the holding company CGG SA (and its recognition in the United States through Chapter 15 proceedings), and of 14 Chapter 11 proceedings in the United States in respect of its foreign guarantor affiliates, was particularly complex and innovative.

In this article, we will examine the interference between the high yield bond documentation and the provisions of Book VI of the French Commercial Code all along the restructuring process, in light of the CGG case.

I. In the framework of amicable negotiations

As a reminder, Article L. 611-16 of the French Commercial Code, introduced by Ordinance No. 2014-326 of 12 March 2014, provides that: "*Any contractual provision which modifies the terms of an executory contract by diminishing the rights or increasing the obligations of the debtor solely by reason of the appointment of a court appointed trustee (mandataire ad hoc) pursuant to Article L. 611-3 or the opening of conciliation proceedings pursuant to Article L. 611-6 or any request made to this end shall be deemed null and void.*"

In other words, and although the concept of executory contract within the meaning of this article has not yet been clarified in case law, it appears that any contractual provision providing that the petition for the appointment of a *mandataire ad hoc* or the opening of conciliation proceedings constitutes an event of default allowing the debt acceleration, shall be deemed null and void. However, the "market practice" financing agreements (either bond or bank financing agreements, as in the "Loan Market Association" template) generally provide for such contractual provisions in.

The protection provided to the debtor by Article L. 611-16 of the French Commercial Code is only effective in domestic law. It will not outreach national borders due to the absence of recognition of *mandat ad hoc* and conciliation proceedings' effects abroad, including *vis à vis* American creditors holding New York law governed debt secured by foreign companies (essentially American ones), as in the CGG case.

Indeed, *mandat ad hoc* and conciliation proceedings do not benefit from any automatic or simplified recognition outside national borders, as standard recognition procedures (such as *exequatur*) are lengthy and do not satisfy the debtor's needs of immediate and simultaneous protection wherever its assets are located.

Within the European Union, neither *mandat ad hoc* nor conciliation proceedings fall within the scope of Regulation (EU) 2015/848 of 20 May 2015 governing insolvency proceedings (recast), just as former Regulation (EU) 1346/2000 of 29 May 2000. Similarly, in the United States, the simplified procedure for foreign insolvency proceedings' recognition, known as Chapter 15 proceedings, does not apply to French pre-insolvency proceedings. Indeed, there are legitimate grounds for questioning the judicial and collective nature of French pre-insolvency proceedings in light of American bankruptcy law, it being noted that the debtor preserves all its management authority.

As for foreign guarantor companies, they could only benefit from *mandat ad hoc* (or conciliation proceedings), and therefore from Article L. 611-16 of the French Commercial Code, if the main centre of their interests was deemed located in France, in accordance with Article R. 600-1 of the French Commercial Code[35].

In any case, Article L. 611-16 of the French Commercial Code does not impede the effects of cross-default provisions provided for in most financing agreements.

Consequently, in any complex international financial restructuring, it will generally be necessary to obtain a waiver from the lenders relating to the opening of the considered pre-insolvency proceedings, even before the debtor can petition for such opening. In the CGG case, the indentures provided that the agreement of at least 50% of each high yield bond issuance was required to waive the event of default relating to the opening of *mandat ad hoc* proceedings.

Obtaining such waivers may be long and expensive, while the restructuring negotiations have not yet started. As a consequence, a bond issuance, even of a small amount, may have a very strong nuisance power, and therefore an important leverage in the negotiations on the consideration to be offered by the debtor for obtaining the waiver.

These crucial preliminary steps will often make the confidentiality attached to pre-insolvency proceedings – although not yet open – very limited, especially when the bonds are listed, as it was the case for CGG. This "publicity" will have to be explained to the President of the competent court in charge of pre-insolvency proceedings.

Pre-insolvency proceedings, theoretically confidential, however turn out to be very useful to organise negotiations between the various stakeholders under the aegis of a *mandataire ad hoc* or *conciliateur* prior to, as the case may be, their finalisation in insolvency proceedings.

Their limits are also known, since neither the *mandataire ad hoc* nor the *conciliateur* have any coercive power over reluctant creditors, who remain only bound by the contractual documentation.

[35] Without prejudice to the afore-mentioned difficulties of recognition of such proceedings abroad

In the CGG case, the economic terms of the restructuring were negotiated in *mandat ad hoc* proceedings with the representatives of each of the main categories of financial creditors , whose support was formalised in a lock-up agreement. Given the efforts requested from the bondholders – with the full conversion of the principal amount of their debt – their unanimous consent was required, which appeared hardly feasible since the listed bonds were held by dozens of holders with various investment size and profile.

II. In the framework of insolvency proceedings

Absent any amicable agreement, the borrower will have to consider finalizing its restructuring in insolvency proceedings, usually safeguard proceedings, as in the CGG case.

While the accelerated financial safeguard proceedings would have been the appropriate legal framework to impose the pre-negotiated agreement on CGG's reluctant creditors in a purely domestic context, such proceedings' tight timetable (which cannot exceed 2 months) was inconsistent with the longer deadlines of US Chapter 11 proceedings, which had to be opened simultaneously in the United States in order to protect the foreign guarantor companies and implement the American component of the restructuring. Therefore, CGG requested the opening of «standard» safeguard proceedings, ordered by the Commercial Court of Paris on 14 June 2017.

Article L. 622-29 of the French Commercial Code provides that "*the opening ruling [of safeguard proceedings] shall not trigger the acceleration of non due debts as at the date of its issuance. Any provision to the contrary shall be deemed null and void*". Any clause providing for the acceleration of the debt as a result of the opening of insolvency proceedings' – included in most of the bond or bank financing agreements – shall therefore be deemed null and void, which offers an effective protection to the debtor under domestic law.

Given the immediate and automatic recognition of insolvency proceedings listed in Annex A of Regulation (EU) 2015/848 (as in the previous Regulation)(including safeguard proceedings and its accelerated versions) within the EU, such contractual provisions would be deemed unenforceable, subject to certain limitations. In the CGG case, a number of foreign (and in particular European) subsidiaries and sub-subsidiaries' shares were pledged for the benefit of bank creditors, leading to the possible application of Article 5, of Regulation (EU) 1346/2000 (now Article 8 of Regulation (EU) 2015/848). Pursuant to this Article 5, creditors having rights *in rem* over the debtor's assets located in a Member State other than that of the opening of the proceedings, are not barred from initiating enforcement actions there. The only protection provided for by Regulation (EU) 1346/2000, applicable at the time, was the opening of secondary insolvency proceedings which were only liquidation proceedings that could not have usefully protected the CGG group.

In any event, a risk will remain for the debtor out of the EU and especially in the United States. Obtaining a new waiver (covering events of default relating to the opening of insolvency proceedings as well as any other default of payment generally) may turn out to be difficult, since, by definition, the debtor may not have the support from the required majority of its creditors on the restructuring agreement. On the US territory, the opening of Chapter 15 proceedings can neutralize such risk *vis-à-vis* the debtor's creditors.

As for the foreign guarantor companies, it may be necessary to protect them, as the case may be, by opening local insolvency proceedings.

In the CGG case, considering the “extensive” jurisdiction that the American courts avail themselves and the universal effect of Chapter 11 proceedings, which is particularly efficient *vis-à-vis* international financial institutions and companies with economic interests in the United States, it has been decided to centralize insolvency proceedings of the foreign guarantor subsidiaries – including the European ones – in the United States, with the opening of 14 Chapter 11 proceedings. This centralization further avoided the opening of multiple insolvency proceedings with potential conflicting effects.

The anticipation of the coordinated opening of the French safeguard, Chapter 15 and Chapter 11 proceedings on the same day will turn out to be essential to best protect the debtor's interests.

Once the insolvency proceedings are opened, the creditors may be consulted on the draft restructuring plan through creditor committees (which will be established automatically, or at the request of the debtor or the judicial administrator, as the case may be). It must be kept in mind that all the bondholders, regardless of the terms, the place of issuance or the law governing the bonds, are gathered in a single bondholders general meeting, which will approve the restructuring plan at a two-third majority of the claims held by the bondholders casting a vote, in accordance with Article L. 626-32 of the French Commercial Code.

This means in particular, as it was the case for CGG, that the guaranteed high yield bondholders were gathered in the same general meeting as the convertible bondholders (holders of OCEANES), whose claims were neither secured nor guaranteed; the interests of these two types of creditors were not aligned, and their treatment differentiated in the draft plan. The high yield bondholders voted on the basis of their claim’s nominal amount, with no weighting of their respective voting rights (such weighting being provided by law in specific circumstances, in particular when subordination agreements were entered into between creditors prior to the opening ruling).

This situation may have created some frustration among the minority bondholders and some misunderstanding from foreign funds, more accustomed to Chapter 11 proceedings which put the enterprise value of the debtor at the centre of the whole restructuring.

The proposal for the European directive on preventive restructuring frameworks dated 22 November 2016 is inspired by the American model. The proposal provides for the creation of homogenous creditor classes sharing the same interest, similar to the creditor classes set up in Chapter 11 or as part of an English Scheme of Arrangement procedure. The proposal also provides that the judicial or administrative authority shall take into account the company’s liquidation value, following the example of the American "*absolute priority rule*", stating that "*a dissenting class of creditors must be satisfied in full before a more junior class may receive any distribution or keep any interest under the restructuring plan*" (Article 2 § 10 of the directive proposal).

Another issue in respect of high yield bonds is the identity of the holder of voting rights within the bondholders’ general meeting. Indeed, the bond issuance is usually subject to foreign law, which may provide for distinctions, unknown under French law, between the economic beneficiary and the legal holder of the debt with the presence of a trustee. The answer will be even more complex if the bonds are cleared and settled through clearing houses and settlement systems (such as DTC, Euroclear and Clearstream). These issues will not be further discussed herein but were solved in the CGG case by an agreement between the judicial administrator and all the relevant stakeholders.

Finally, it should be recalled that creditors benefit from the plan only if their claims are allowed in the debtor's insolvency. Therefore, in parallel to the negotiations on the draft plan, creditors must file proofs of claims. Despite the simplified procedure introduced by Ordinance No. 2014-326 dated 12 March 2014, creditors are advised to file their proofs of claim within 2 months (4 months for foreign creditors) of the publication of the safeguard opening ruling in BODACC (a French legal gazette). In this respect, it will be up to the bondholders to ensure that the trustee or the bondholders group representative (in accordance with Article L. 228-84 of the French Commercial Code) have filed the relevant proofs of claim within the legal deadlines.

After the approval of CGG's safeguard plan by the creditor committees and the bondholders general meeting in France, the affected creditor classes in Chapter 11 proceedings and the plan's confirmation by the US judge, the draft restructuring plan had to be submitted to the vote of the shareholders' general meeting. This veto right granted to shareholders in French insolvency proceedings confounded CGG's international creditors. The mitigation of this principle introduced by law No. 2015-990 dated 6 August 2015, known as the "Macron Law", remains very limited and undoubtedly difficult to apply by a listed debtor company. The ruling sanctioning the safeguard plan issued by the Commercial Court of Paris on 1st December 2017 was finally recognized by an order of the US judge dated 21 December 2017 as part of the Chapter 15 proceedings.

Despite the afore-mentioned complex issues raised by the high yield bond restructuring, the CGG case demonstrates that negotiations ahead of insolvency proceedings in order to agree on the restructuring terms with the representatives of the main categories of financial creditors, combined with the meticulous preparation of the insolvency proceedings in France and in the United States, are key to a successful multi-jurisdictional restructuring. Thus, on 21 February 2018, CGG's restructuring plan was fully implemented, and the high yield bondholders became the majority shareholders of CGG, alongside the convertible bondholders and the former shareholders.

CROSS BORDER RESTRUCTURING OF HIGH YIELD BONDS

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The restructuring of CGG, a world leader of geophysical services primarily from the global oil and gas industry, has been so far the biggest restructuring case in France since Eurotunnel. It was also a première for French Safeguard proceedings with parallel Chapter 11 and Chapter 15 proceedings in the US in order to conduct a cross-border restructuring. CGG was facing important difficulties following the drop in oil prices which saw its revenues fall from USD 3.7bn in 2013 to USD 1.2bn in 2016 with an indebtedness close to USD 3.3bn (600M of maritime exposure, 800M of secured debt, 400M of convertible debt and 1.5bn of high yield bonds ("HYB") issued in 2014 under New York law. Most of this indebtness was borrowed by the French holding of CGG, CGG SA, with guarantees across the group which had more than one hundred subsidiaries across the world. The ability to obtain a deal with high yield bonds was the most important aspect to achieve not only because they hold by far the biggest stake in the indebtedness but mainly because based on the enterprise value of CGG at that time, the value was breaking in that class. Before describing the key role of the high yield bonds steering committee in the successful restructuring of CGG and how the high yield bonds have been handled in that context, it is important to understand the main characteristics and the market of high yield bonds in the US.

1. Overview of the Main Characteristics and Market of High Yield Bonds in the U.S.

High yield bonds are corporate bonds that are rated as "speculative" (or below "investment grade") due to their greater risk of future default. The companies that issue these bonds include companies that have experienced financial or operational issues, companies that operate in competitive or challenged industries and newer companies without a proven track record. Based on their additional risk, issuers of high yield bonds are typically required to pay higher rates of interest and are subject to more stringent restrictions in their loan covenants than investment grade issuers.

The U.S. market for high yield bonds remains robust and continues to grow. According to SIFMA[36], approximately $8.8 trillion of corporate bonds were outstanding in the U.S. bond market as of the end of 2017. In 2017, new issuances of high yield bonds were approximately $276 billion, which is 20% higher than the previous year, and the early months of 2018 have kept pace. The large majority of these new issuances – approximately 65% – represented refinancing of existing debt (refinancing and repricing activity also represented a significant portion of the leverage loan market in 2017 – approximately 37%). Overall, average yields on interest rates for new issuances have dropped, while covenant protections have also weakened.

As a result of the healthy market for refinancing, many companies have been able to extend the maturities on their existing debt. Moreover, the presence of less restrictive covenants have

[36] Securities Industry and Financial Markets Association.

allowed companies to prolong the amount of time before they are forced to restructure their capital structure. For the best or for the worst.

2. Overview of the Main Characteristics and Market for U.S. High Yield Bonds Restructuring

The restructuring of high yield bonds in the United States may be accomplished through an out-of-court "work-out" or court-supervised proceedings. Restructuring out of court offers many advantages – it can generally be accomplished more quickly at significantly less expense, it avoids the stigma of a bankruptcy filing which may harm the business, and management retains greater control over the process and avoids the distraction that a bankruptcy case typically involves. Nevertheless, out-of-court restructurings are not well suited for every situation – in particular, because it relies on the consensual participation of its creditors, creditors who choose not to participate (i.e., "hold-outs") can make it difficult to fully restructure a company's debt. Moreover, out-of-court restructurings are less likely to succeed when a company has a complex capital structure involving multiple creditor classes with conflicting interests. An out-of-court restructuring of high yield bonds often takes the form of an exchange offer, although private exchanges with a limited number of holders or other structures may also be possible. In an exchange offer, the issuer offers to repurchase its existing bonds in exchange for new debt, equity, warrants, cash or other consideration.

In contrast, a court-supervised bankruptcy case provides the opportunity to bind all creditors to a restructuring plan, as long as the requirements for confirmation have been met, including that each class of creditors has voted to accept the plan (based on acceptances by more than 66 2/3% in dollar amount and 50% in the number of creditors of each voting class), is deemed to accept the plan (through "reinstatement" or other forms of "unimpairment") or can be forced to accept the plan by satisfying certain "cram down" requirements under the Bankruptcy Code. Furthermore, unlike out-of-court restructurings which are typically limited to a "financial" restructuring (i.e., a restructuring of the company's capital structure), the bankruptcy process allows a company to also undertake an "operational" restructuring, which may include selling unprofitable assets or businesses, and renegotiating labor or other contracts, among other things.

3. Cross border Restructuring of High Yield Bonds in the context of CGG

In the international context, it is becoming increasingly common for a Company to conduct the restructuring of its obligations in a foreign jurisdiction's restructuring proceedings which is then given effect in the United States through ancillary proceedings conducted under Chapter 15 of the Bankruptcy Code. While the law continues to evolve, many U.S. courts have shown an openness to allowing restructurings to be conducted in this way, even when the debt involved is governed by U.S. law, and have afforded significant deference to a foreign court's proceedings, even when the outcome or process differs from U.S. law or practice.

For CGG, as the issuer was a French company, borrower of USD 2.8bn with its head office in France and listed on Euronext Paris stock exchanges, the *mandat ad hoc* (French out-of-court proceeding) as well as the safeguard were opened by the Paris Commercial Court and considered as the main proceedings to conduct the restructuring. In parallel, Chapter 11 proceedings were opened by the Bankruptcy Court of the Southern District of New York to protect the secured assets of the group and to deal with the potential risk of cross-default under the financial documentation. Finally Chapter 15 proceedings were also opened by the same court to recognize the Safeguard proceedings.

The restructuring of high yield bonds also generally differs from the restructuring of loans (or "bank debt") in certain crucial ways. Unlike syndicated loan facilities, where the number of lenders is relatively limited, bonds may be held by hundreds or even thousands of bondholders. These bondholders range from large institutional investors (like mutual funds and pension funds) to potentially individuals, and therefore may differ widely from one another in size, sophistication and investment objectives. Moreover, while administrative agents for syndicated loan facilities keep an official register of lenders, and therefore know precisely how much of each type of loan is held by each lender, the way bonds are typically held (as a global note registered in a single depositary's name with beneficial interests in the note owned by beneficial holders through their custodians and brokers) often makes it more difficult to determine who bondholders are, let alone to communicate with all of them effectively. Moreover and given the speculative nature of the holding of high yield bonds issued by a company known to face market downturn, high yield bonds trading volume may increase and holders become even more difficult to track.

For this reason, months before the opening of the *ad hoc* mandate, a steering committee was set up with bondholders who collectively hold a significant portion of CGG's bonds, to align themselves on the negotiations and restructuring strategy and who were keen to be part of that committee. Being part of that committee means taking on the task of participating in a month-long series of negotiations with other relevant stakeholders, and becoming "restricted" for some period of time (which restricts their ability to trade bonds) in order to do so. Once an agreement in principle was reached in June 2017 with the full equitization of the high yield bonds, they then had to lock themselves up for months to support and participate in a restructuring proposal and commit to backstopping the increase of CGG's capital. In addition to the distribution of new equity and debt on account of their bond claims, which all bondholders also received, the steering committee members also received a global coordinator fee (in the form of warrants) and fees for backstopping the private placements (in the form of cash and warrants).

The equitization of all or a significant part of the high yield bonds was the only solution for CGG to reduce debt levels and related cash interest costs and as such addressing its capital structure constraints. Given the value was breaking at this level, the high yield bonds were deemed to be fulcrum security from a US perspective and therefore benefited from significant leverage in case of failure of the French jurisdictions to sanction a restructuring. In France, there is no legal way to force such equitization so the consent of the high yield bonds was mandatory. Under the terms of the high yield bonds' documentation, unanimous consent of the bondholders was required, which is common practice for that kind of instruments. However as stated above, given the great number of bondholders and the potential difficulties to identify some of them, the chance of obtaining unanimous consent was minimal. This is one of the main reasons why CGG's restructuring had to be implemented under a French safeguard procedure where such equitization is approved by the bondholders committee (high yield bondholders together with convertible bondholders) by a two third majority "*notwithstanding any contractual provisions to the contrary and notwithstanding the law applicable to the issuance agreement*", pursuant to Article L. 626-32 of the French Commercial Code. An accelerated financial safeguard should have been worked too on that specific feature but it cannot length more than two months when at the same time a chapter 11 connot length less than two month. This timing issue led to the opening of a classical safeguard.

On July 28, 2017, as part of the safeguard procedure, the restructuring plan was approved by (i) the committee of banks and financial institutions and by the general meeting of bondholders at a majority of 93.5% of the creditors who cast a vote, (ii) on October 2, 2017, by the creditor classes entitled to vote on the Chapter 11 plan in the United States and (iii) on November 13, 2017 by the extraordinary shareholders meeting.

The main lesson to be drawn from the restructuring of CGG was the efficiency of the French legal system to deal with complex restructuring and the ability to successfully deal with parallel French and US proceedings. However, during the months of negotiations, some US bondholders, who discovered the French system for the first time, were surprised by the shareholders' powers (as a listed company, their approval of the restructuring was needed at CGG's Extraordinary General Meeting) despite the fact that they were out of money, the lack of shareholders' cramdown under safeguard proceeding and the difficulty to implement the so called "*loi Macron*" to cramdown shareholders under a potential *redressement Judiciaire* (French insolvency proceedings) and the creditors' consultation by claim type when the consultation is by classes in the United-States. The French legal system may change soon on these specific aspects based on the latest draft of the European directive on preventive restructuring.

THE INFLUENCE OF MINORITY SHAREHOLDERS

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On 21 February 2018, the para-petroleum company CGG announced that it has finalised a debt restructuring plan, via various issuances of shares and equity-convertible securities – a plan that was unique both in terms of amount ($2.7 billion of restructured debt) and of complexity of the multi-jurisdictional environment.

In the context of such financial restructuring operations conducted in France in application of a Safeguard Plan (*Plan de Sauvegarde*), this restructuring process is an emblematic example of the key challenge that the support of minority shareholders can represent (1) for a listed debtor who, under the current state of substantive law, has no other choice but to enlist their support, in particular by securing them contractually (2).

1. Support from minority shareholders, a key issue for the listed debtor under restructuring

1.a Vote on modifications to the share capital, a key prerogative of the shareholders

Whenever the draft Safeguard plan provides for a change in the debtor's share capital, it must be submitted to a vote of the General Shareholders Meeting[37]. This requirement engraves into insolvency law the crucial prerogative of the shareholder's vote on decisions falling under the competence of the General Shareholders Meeting, in a continuum with the jurisprudence of the Court of Cassation[38]. The shareholders' consent is therefore needed in addition to the approval of the plan by the Committee of Financial & Related Credit Institutions (*Comité des établissements de crédit et assimilés*), the Committee of Major Suppliers, and the Bondholders Committee[39].

Strangely enough in terms of procedures, whereas the creditors had to be consulted about the plan prior to its approval by the Court, it was allowed until recently to convene the General Shareholders Meeting only after the Court's ruling, to implement any modifications to the bylaws provided by the plan[40].

Aware of the uncertainty affecting a plan which, despite its approval by the Court, would remain subjected to its contingent approval by the shareholders, insolvency practitioners had however ensured that it would be approved by the General Shareholders Meeting prior to the court hearing scheduled to review the plan, under the condition precedent of its approval by the Court. The legal statutes are now aligned with this predominant practice, and since 20 November 2016, the General Shareholders Meeting must vote on the plan prior to its Court approval, thereby keeping away from the Court any plan that would not contain the essential conditions to guarantee its implementation.

[37] Article L. 626-3 of the French Commercial Code – In application of this article, the plan must be submitted to the general meetings of shareholders of defined categories and to the general meetings of warrant holders when their related rights are affected.
[38] Cass. Com. 23-10-2007, n°06-16.537
[39] Whenever such committees and assemblies are formed.
[40] Former Articles L. 626-15 to L. 626-17 of the Commercial Code

Furthermore, in a listed company environment, the Financial Market Authority (AMF, *Autorité des Marchés Financiers*) requires that the General Shareholders Meeting be held after the meetings of the Creditors Committee and Bondholders Committee, even though nothing in any legal text requires such sequencing for the bondholders.

1.b. Stable minority shareholder, the preeminent shareholder in a listed company environment

On 31 October 2017, when the CGG shareholders held a general meeting to vote on the resolutions required to implement the draft Safeguard Plan, only 22.48% of them were present or represented, i.e. less than the 25% quorum required[41] for the meeting to deliberate validly on financial restructuring operations. A second Shareholders Meeting was then reconvened with the same agenda on 13 November 2017 where the 20% quorum required on second notice was reached.

One year earlier, the General Shareholders Meeting of Solocal Group had provided another example illustrating the difficulties linked to this context of listed company, when votes in favour of such resolutions failed to reach a two-third majority of the shareholders[42] (with a quorum of 38.95%), even though the required quorum was reached to vote on the extraordinary resolutions necessary to implement the changes linked to the fast-track financial safeguard plan (SFA, *Sauvegarde financière accélérée*). Some minority shareholders had then regrouped to reopen the negotiations and request new financial restructuring terms, leading to another General Shareholders Meeting on 15 December 2016, when the revised restructuring plan was finally adopted with a very short majority of 66.95% (and a quorum of 50.13%).

In this respect, it is interesting to note that the dispensatory power granted to the courts via insolvency law to decide that the competent assembly can deliberate on changes in bylaws upon first notice to convene and by a simple majority vote (instead of two-thirds) in counterpart for a quorum raised to at least 50% (instead of 25%)[43], is not helpful for listed companies who struggle to mobilise their shareholders.

The reason why CGG had difficulties reaching a sufficient quorum to deliberate on its restructuring operations and Solocal Group to obtain a two-third majority vote, is that the shareholding of listed companies is particularly scattered and primarily formed of floating shares – at 31 December 2017, public shareholding accounted for 82.1% of CCG capital and 80.8% of its voting rights[44] (respectively72.2% and 72.4% for Solocal Group[45]).

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[41] Article L. 225-96 para. 2 of Commercial Code

[42] This majority is required by Article L. 225-96 para. 3 of the Commercial Code

[43] Article L. 626-3 para. 1 of Commercial Code – Specifying that ordinary law provisions related to the quorum and majority will apply again to the shareholders meetings reconvened on second notice

[44] Based on 2017 reference document – The balance is split primarily as follows: 9.4% (10.9%) for Bpifrance Participations ; 7.9% (7.8%) for DNCA; 0.5% (0.5%) for IFP Énergies Nouvelles (acting jointly with Bpifrance Participations)

[45] Based on 2017 reference document – The balance is split primarily as follows: 8.4% (8.3%) for J O Hambro Capital Management; 8.2% (8.2%) for River & Mercantile AM; 5.9% (5.9%) for DNCA; 5.2% (5.2%) for Edmond de Rothschild AM

Thus, as is often the case in a listed context, the relative weight of a stable minority shareholder becomes predominant to reach a quorum and the majority vote required to adopt the restructuring plan. Securing their support is therefore a key challenge for a successful restructuring process.

2. Contractually securing the support of shareholders in the absence of any binding alternative

2.a. Lack of sufficient insolvency tools

Faced with the possibility for minority shareholders – due to their objection to any bylaw changes (e.g. a dilutive capital increase) – to cause the failure of a restructuring plan supported by the creditors (whose debt recovery is *a priori* a priority over the shareholders) who may have in turn agreed to significant efforts (e.g. debt write-offs), two instruments were recently made available to practitioners to secure the primacy of the insolvency proceedings over the shareholders' prerogatives.

Firstly, whenever the shareholders equity has dropped below half of the share capital and has not been reconstituted[46], the Receiver (*Administrateur*) may request the appointment of a *Mandataire* in charge of convening the competent assembly to vote on its reconstitution up to an amount proposed by the Receiver, on behalf of the non-consenting partners or shareholders, whenever a draft plan provides for a change of equity in favour of one or several persons who commit to execute the plan[47]. Secondly, whenever warranted by the debtor's economic and labour importance[48], the Court may[49] bypass the rejection of the shareholders meetings by appointing a *Mandataire* in charge of convening the competent assembly to vote on the capital increase in lieu of the shareholders who rejected the equity change[50].

These instruments, created respectively in 2014 and 2016, have however raised numerous debates regarding the disproportionate nature of the breach they implicate against the shareholders' ownership rights (both by depriving them of their voting rights and diluting their financial interests) and has therefore been restricted to receivership procedures (*redressement judiciaire*) where it can be considered that the debtor's insolvency status (i.e. payment default) would grant primacy to the preservation of its business operations[51].

2.b. Contractually securing the support of minority shareholders

[46] Article L. 626-3 para. 2 of Commercial Code
[47] Article L. 631-9-1 of Commercial Code
[48] It is required in particular that (i) the debtor employs at least 150 workers or creates a dominant company made up of one or several companies with a total headcount of at least 150 employees, (ii) the discontinuance of its business may cause severe disruptions for the national or regional economy or for the local labour basin, and (iii) a change in the capital structure emerges as the only serious solution to prevent such disruptions and enable the continuity of business, following a review of the possibilities for a total or partial disposal of the company.
[49] At the request of the judicial receiver or the public prosecutor, on completion of a deadline of 3 months after the opening judgement
[50] Article L. 631-19-2 of Commercial Code
[51] Re. article L. 631-19-2 of the Commercial Code, see paragraph 145 of Decision No. 2015-715 DC of 5 August 2015 issued by the Constitutional Council regarding the forced dilution mechanism "established by the lawmaker, which contributes to safeguard the rights of the company's creditors, does not cause any manifestly disproportionate breach of the ownership rights of the partners and shareholders"

In the absence of instruments forcing a dilution apart from a receivership (*redressement judiciaire*) procedure, a cautious debtor should, similarly to CGG[52], initiate discussions with its minority shareholders in the context of Safeguard proceedings, in order to secure contractually their support to the restructuring plan.

From a policy perspective, the debtor should first of all seek its shareholder's commitment to support the plan proposed by the debtor to the exclusion of any other plan[53], to attend and vote at the General Shareholders Meeting, and more generally to take any necessary measures required to implement the restructuring plan. The agreement may also provide that the shareholder, if he fulfils the requirements, will act as vote teller[54] at the Shareholders Meeting, for the purpose of forming a bureau – a crucial body of the General Shareholders Meeting to ensure proper governance and functioning of the deliberations and dispute resolution as needed – that will consider the restructuring plan favourably.
Whenever the plan provides for a capital increase open to existing shareholders, support from the minority shareholders can also involve a financial dimension with a commitment to subscribe and/or a guarantee to underwrite all or part of the capital increase. Apart from securing a minimum fund injection, such a commitment attesting to the trust of a reference shareholder in the implementation and outcomes of the restructuring plan, will also foster the participation and buy-in of other shareholders in the transaction.

Lastly, in order to secure the efficiency of the commitments taken, the minority shareholder should be prohibited from selling or transferring their stake in the debtor's equity capital until the restructuring plan is fully implemented.

The minority shareholder will ensure that a calendar is stipulated for the key restructuring steps, and will be fully released of their commitments in the event of non-compliance with this calendar. The minority shareholder will also seek a financial counterpart (e.g. calculated as a percentage of the guaranteed underwriting amount) for their commitments on capital subscription and/or underwriting guarantee. Lastly, and most of all, the minority shareholder will secure from the debtor a commitment to be fully involved in the new governance to be set up on completion of the restructuring plan.

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As a key issue for the restructuring of a listed debtor, securing the support of minority shareholders is therefore a complex exercise which, if improperly controlled, can jeopardize the contemplated restructuring. This balance of power should however change shortly in favour of the debtor and its creditors with the draft European Directive on restructuring procedures [55] stating unambiguously

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[52] As early as 2 June 2017, the press release published by CGG informing the market about the signature of an agreement in principle stated that this agreement was supported by CGG's major creditors as well as by DNCA as a long-standing institutional shareholder.
[53] Article L. 626-30-2 para. 1 allows any creditor who is a member of a creditors committee to submit a plan proposal.
[54] Under the provisions of Article R. 225-101 of the Commercial Code: "The vote tellers of the General Shareholders Meetings shall be the two members holding the largest number of voting rights and agreeing to fulfil this duty."

[55] Draft Directive of the European Parliament and Council dated 22 November 2016 on "preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU"

that "*the adoption of a restructuring plan should not be conditional on the agreement of the out-of-the-money equity holders, namely equity holders who, upon a valuation of the enterprise, would not receive any payment or other consideration if the normal ranking of liquidation priorities were applied*"[56].

On this occasion and in a continuum with the changes made in 2014 and 2016, it would be desirable, in a listed context and to account for the intrinsically scattered shareholding structure, to allow the General Shareholders Meeting to deliberate validly on first notice to convene with a quorum of 20% (instead of 25%) of shareholders with voting rights, while reducing the required majority down to 50% (instead of two thirds) of the votes cast.

More generally, the vote could take place from the outset of the restructuring process, in the form of an authorisation granted to the debtor to decide its definitive terms, and, as considered in the Directive, define the shareholder classes that would be formed in order to grant voting rights only to the shareholders who are "in the money"[57].

As a last resort, the Court could then appoint a *Mandataire* to vote in lieu and on behalf of non-consenting shareholders who might "*unreasonably prevent the adoption of a restructuring plan which would restore the viability of the debtor's business*"[58].

[56] Para. 29, p. 34 of draft Directive
[57] Some shareholders may own preferential shares granting them a priority return over ordinary shares, and the valuation of the debtor's business could mean that the preferential share owners only would be "in the money".
[58] *Id.*

THE STATE SHAREHOLDER IN FINANCIAL RESTRUCTURINGS OF LISTED COMPANIES

Anne-Sophie Noury, Partner BDGS

Examples of financial restructurings of listed companies requiring the equitization of a significant part of debt, and correlatively involving a significant dilution of historical shareholders, which may include the State or public investment groups, have increased lately.

Such restructurings require the prior consultation and approval of two key actors with distinct interests: on the one hand the creditors, and on the other, the shareholders. In practice, this dual consultation implies that shareholders can block in general meeting the adoption of a financial restructuring approved by the creditors, in particular on the grounds that they would be excessively diluted. The risk of a blocking power is strengthened in listed companies where it is difficult to anticipate the direction of the majority vote.

To reduce this risk, the "Macron Law" introduced certain coercive measures to force the adoption of a restructuring plan by the general meeting of the shareholders[59]: article L. 631-19-2 of the French Commercial Code now allows for the appointment of an agent in charge with convening a new general meeting and voting in place of dissenting shareholders in favour of the share capital increase, or even ordering the transfer of the shares of these shareholders. Certain practitioners propose to consolidate and expand this mechanism in order to eliminate any right of opposition of the shareholders and thus facilitate the adoption of a highly dilutive restructuring plan[60].

The proposal for a Directive on insolvency proceedings[61] goes in this direction by providing a restructuring plan cram-down mechanism : in the event of rejection by the shareholders (or a class of creditors), a restructuring plan can be confirmed by the Court, on condition that (i) it is approved by at least one class of creditors and (ii) dissident classes are not unfairly prejudiced by the proposed plan. In this regard, the draft Directive provides for an absolute priority principle corresponding to the "absolute priority rule" applicable in the US under Chapter 11, whereby "a dissenting class of creditors is paid in full before a more junior class can receive any distribution or keep any interest under the restructuring plan" [62].

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[59] Law n ° 2015-990 of August 6th, 2015 for the growth, activity and equality of economic opportunities, article 238

[60] Indeed, besides the relatively narrow scope of this mechanism, its implementation faces in practice many difficulties, especially when the company is listed: difficulties in establishing the existence of a cause of serious problem for the national, regional or local economy and the employment pool**,** difficulties in implementing a share capital increase within a time period of thirty days from the deliberation of the general meeting, a period of three months from the opening of an insolvency procedure and the use of this mechanism, etc.

[61] Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measure to increase efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/UE

[62] Recital 28 and article 8 of the Draft Directive

In this context, the modalities of the transposition of this draft Directive – in the event that it is adopted by the European Parliament –, and more generally the framework of the conditions for the implementation of a restructuring plan cram-down mechanism on the shareholders of a distressed company, should be considered.

This framework should not be subject to exceptions specific to the State that is required above all to behave as a prudent investor[63]. In addition, the State, guarantor of the general interest, may request political counterparts in addition to financial counterparts that any shareholder may request.

1 Consultation of shareholders in the event of the transposition of a restructuring plan cram-down mechanism

With the proposed Directive, one can certainly question the advisability of maintaining the consultation of the shareholders' general meeting when the application of the absolute priority principle does not allow them to receive any value, even if a share capital increase of the distressed debtor is in principle necessary to equitize part of the debt.

1.1 Maintaining the shareholders' consultation

A complete elimination of the shareholders' consultation does not seem appropriate to us.

First of all, there is an important risk that such measure would be judged unconstitutional. Indeed, if the French Constitutional Council considered that the provisions of the "Macron Law" mentioned above complied with the Constitution, it was not only because they were justified by the general interest but also on the grounds that their scope is limited to certain strategic companies, the closure of which would be likely to cause serious problems for the national, regional or local economy and the employment pool and that the infringement of the shareholders' property rights only concerns dissenting shareholders[64]. On the other hand, the constitutionality of an elimination of the consultation of shareholders' general meeting would be more problematic as its scope and its conditions of implementation would be much wider without being justified by public necessity.

Furthermore, assuming that such measure is found to be compliant with the Constitution, it does not seem to us appropriate, insofar as it prevents de facto finding an agreement based on the approval of the majority of each class concerned by the restructuring, shareholders included. An agreement approved by all stakeholders - with the applicable majorities - seems to us preferable than an agreement imposed on some of them, which inherently presents a greater risk of execution or litigation.

1.2 Consulting shareholders prior to creditors

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[63] This principle of the prudent investor does not remove the possibility for the State to grant safeguard or restructuring aid, but these are subject to strict conditions, particularly in terms of amount and duration, and must be, where appropriate, accompanied by compensatory measures. This aid can therefore only be used in specific circumstances.

[64] Decision n ° 2015-715 DC of August 5th, 2015

Current practice in the restructuring of listed companies consists in convening a general meeting after establishing the restructuring plan and after consulting creditors. Such practice places the shareholders in a situation where they have no choice but to validate a plan in order to avoid a sale of assets. It artificially creates a deadlock that the creditors and the debtor describe as abusive on the grounds that there is no longer any alternative to the plan. Therefore, it would be advisable to allow the shareholders' general meeting to be consulted prior to the creditors rather than afterwards.

Indeed, such a chronology would allow the shareholders to decide on the draft restructuring plan before such plan is completely set and, if the restructuring timetable and the company's treasury allow it, to organise, in the event of a rejection, a second shareholders' consultation[65] after adding certain adjustments to the initial draft plan. Such a faculty to "survey" the shareholders on the draft restructuring plan would be particularly useful when the shareholders base of the debtor is fragmented, as is the case in many distressed listed companies. In this hypothesis, the restructuring plan cram-down mechanism would only be a last resort implemented in the sole case where at the end of a second consultation, the shareholders have rejected the plan again, or in the case where the plan would have been rejected during a first consultation and the organisation of a second consultation is impossible.

Lastly, this chronology would allow the independent expert who must, for listed companies, assess the fairness of the financial conditions of the restructuring plan prior to the shareholders' general meeting, to better take into consideration the possible alternatives to the draft plan – which do not or nearly not exist anymore when the general meeting is held at the very end of the restructuring process.

2 The economic framework of a restructuring plan cram-down mechanism

In the hypothesis where a restructuring plan cram-down mechanism is transposed into French law, the conditions to be respected by the draft restructuring plan providing for the equitization of a part of the debt and correlatively a dilution of the shareholders that would allow a Court to impose such plan on the shareholders, would need to be considered.

To this effect, it is necessary to distinguish between the treatment of share capital or debt injections prior to the restructuring ("old money"), and the injection of new funds ("new money").

2.1 Priority given to creditors on the treatment of « old money »

The application of the absolute priority principle should in practice lead to the possibility to equitize debts without the dilution of the historical shareholders being capped.

However, for the draft restructuring plan to benefit from the cram-down mechanism, this equitization should take into account the value of certain receivables based on market prices.

[65] In listed companies, a general meeting of shareholders must be convened at least 35 days prior to the meeting date. We believe that in case of distressed listed companies such convening delay should be reduced.

Applying this principle should reconcile the principle of primacy of the creditors over the shareholders with the absolute priority rule, while ensuring that the dilution of the shareholders is fair. It would incidentally mitigate the interest of certain investment strategies involving the acquisition of debts incurred by a distressed company at a highly discounted price with a view to equitizing them at favourable conditions.

2.2 Priority given to creditors on the treatment of « new money »

Moreover, the draft restructuring plan would not be able to benefit from the cram-down mechanism, unless it allows the shareholders to bring in priority the new funding necessary to the business of the debtor.

Such principle would allow the shareholders willing to make new contributions to maintain their rights in the company.

In practice, in order for this priority right to be fully effective, it should be proposed to the shareholders to subscribe to a share capital increase with preferential subscription rights for an amount equal to the totality of the new funding required by the debtor, without the conditions relating to the 75% subscription threshold and the guarantee of the share capital increase applying and which therefore cannot be used as an excuse by the creditors to limit, or even eliminate, this priority of the shareholders. This would imply that the legislator provides an exception to Article L.225-134 of the French Commercial Code concerning the minimum subscription amount and that the French Financial Market Authority (AMF) modifies its doctrine in order to allow the company not to use a guarantee during such a share capital increase[66].

In addition, in the event that the shareholders do not fully provide the new funding necessary to the companies' business, the contribution of such funding by the creditors could be implemented via share capital or debt, but in the case of debt, an expert should be designated in order to make sure that the legal and economic conditions of their contributions are similar to those offered to the shareholders during the share capital increase with preferential subscription rights.

3 The political framework of a plan cram-down mechanism

In the event of an equitization of all or part of the debt, certain creditors that recompose the share capital may be subject to internal rules which force them to dispose very quickly of their stake on the market or may not have the internal skills to assume the political and strategic role of a shareholder. As a consequence some debtors remain significantly weakened post restructuring.

A cram-down mechanism requires a political framework. Such a framework would take into account the legitimate interests of certain historical shareholders, in particular those of the State

[66] AMF position n ° 2007-11, share capital increases through the free allocation of share subscription warrants, replaces for preferential subscription right in which the Financial Market Authority (AMF) considers that a guarantee is necessary if "the issuer submits a working capital statement with reserves."

shareholder that is the guarantor of the general interest, by ensuring notably that the restructuring is accompanied by stable and competent governance (due to a majority of independent directors with the necessary skills), preserves employment in the conditions and limits provided by the plan and more specifically, guarantees the integrity of the group for a certain duration.

In conclusion, one cannot hold the position whereby historical shareholders of a listed company undergoing financial restructuring would have the right not to be diluted beyond a certain threshold. Conversely, there is neither a "right to dilute" in favour of creditors, any cram-down mechanism imposed on the existing shareholders being subject to fair economic and political conditions and likely to preserve the going concern of the company. It is legitimate that the State, when it is shareholder or when the company is strategic, takes part in defining this framework.

CORPORATE RESTRUCTURING IN THE FACE OF MARKET CONSTRAINTS

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Jean Dypréau, a Belgian author, once said: "anyone who thinks straight stumbles". What would one then say of directors of a listed company undergoing a restructuring process who have to navigate between securities law and insolvency law which are each pursuing different and conflicting purposes: market and shareholders' protection on the one hand; protection of the business, its employees and – to a certain extent – its creditors, on the other.

These different and conflicting purposes become obvious when addressing the following issues:

– first, management of inside information (**1.**). The French Stock Market Authority (AMF) recognizes in its guidelines on permanent information and management of inside information that "*directors [of insolvent companies] face a particular problem relating to securities law, i.e. informing the public in accordance with the requirements set forth by the applicable provisions and insolvency law, which allow the confidentiality of certain information to be maintained*"[67];

– second, value distribution between creditors and shareholders, both players benefitting from considerable negotiation leverage as a result of the creditor's required approval of any company safeguard plan, and the shareholders' sole competence to approve, in an extraordinary general meeting, any share capital increase of the company, whether to raise new funds or to convert existing debt into capital (**2.**);

– finally, content of the independent expert report which, until the CGG transaction, dealt almost exclusively with shareholders. Concerned with always providing shareholders more information in this type of complex transactions, the AMF has now increased its requirements and expects independent expert reports to contain a comparative analysis on the treatment of each category of creditors and shareholders (**3.**).

1. Management of inside information in restructuring transactions

Dissemination of inside information[68] follows three simple principles:

(i) the obligation for any issuer to disclose any inside information as soon as possible[69], except in case of deferred public disclosure[70], which requires to demonstrate that (a) public disclosure of such inside information would harm a legitimate interest of the issuer, (b) deferred public disclosure does not present a risk of misleading the public and (c) the issuer

[67] AMF guidelines on permanent information and management of inside information – DOC 2016-08, section 1.4.4.

[68] For the record, inside information is "information of a precise nature which has not been made public, which directly or indirectly relates to one or more issuers, or one or more financial instruments, and which, if made public, would be likely to have a significant impact on the price of the financial instruments concerned or the price of derivative financial instruments linked to them" (Art. 7 of European Regulation No 596/2014 of 16 April 2014 on market abuse (MAR)).

[69] Art. 17.1 of the MAR regulation.

[70] It should be noted that deferred information is not allowed in the event of a profit warning.

can ensure confidential treatment of the information whose public disclosure has been deferred;

(ii) an issuer may disclose inside information to a third party provided that such party has previously entered into a confidentiality agreement[71] whereby it acknowledges, in particular, being aware of the market abuse regulation as well as the obligations arising therefrom and which result from being in possession of inside information; and

(iii) equal information between creditors and the market must be restored before any market transaction is carried out, as the AMF requires a specific statement on this topic in the prospectus submitted for its approval[72].

In light of the foregoing, negotiations between an issuer facing financial difficulties and its creditors must be governed by confidentiality agreements covering, in particular, inside information that may be exchanged. In order to limit to the fullest extent possible the periods during which creditors are restricted from intervening on the market, creditors holding listed financial instruments, in particular hedge funds, require the issuer to make public, on predefined dates and depending on the progress of discussions, all inside information exchanged in the course of negotiations (cleansing of inside information). Traditionally, the responsibility for cleansing and assessment of the information to be disclosed to the market lies with the issuer, sometimes with a more or less extensive right of scrutiny granted to the creditors.

In the CGG transaction, this right of scrutiny was transformed into a true joint control of the cleansing process, as is the case in common law practice. Indeed, the purpose for hedge funds was to avoid any debate on whether the content of the information communicated to them was inside information or not, which could have had an impact on their ability to trade on the market. Thus, hedge funds have not only pre-approved the content of the communication on the financial terms (notably the business plan), but also obtained CGG's commitment, in the event of disagreement on the restructuring plan, to make publicly available the content of the latest restructuring proposals made by the various stakeholders. It is obvious that this unique arrangement, which encourages institutional actors to come up with more reasonable proposals or otherwise be publicly discredited, has had a certain psychological effect since many stakeholders have, almost systematically, submitted a new proposal the day before the deadlines for cleansing by the company.

From a market perspective, the virtue of this type of practice is more debatable insofar as it is extremely complex to analyze the differences in positions between restructuring options (which can be very different) and to deduce a probability as to the various stakeholders' ability to reach an agreement. In a nutshell, too much information kills the information.

2. Shareholder treatment in the restructuring of listed companies

While the interests of the company and its shareholders are often aligned, recent restructurings of listed companies, and in particular the CGG transaction, have shown that this may not always be the case. This should not come as a surprise for law practitioners given that both legal doctrine and

[71] Art. 17.8 of the MAR regulation.
[72] See in particular AMF Report 2010 p. 141.

case law unanimously consider that the interest of a company is not necessarily aligned with that of its shareholders[73].

Unlike US law where a shareholder has no say in restructurings, shareholders of French listed companies have an extremely important leverage insofar as they can refuse to adopt at a general shareholders' meeting the resolutions necessary to implement a restructuring plan (in particular, a share capital increase by converting existing debt or raising new funds).

Analysis of previous restructurings of listed companies has led some restructuring players on the market to consider that the dilution of shareholders in this type of transactions could not result in them holding less than 10% of the post-restructuring share capital[74], as illustrated in the table below.

Company	**Solocal**	**Latécoère**	**Belvédère**	**Pages Jaunes**	**Technicolor**	**Eurotunnel**
Restructuring date	2017	2015	2013	2013	2009-2010	2006
Initial debt *(debt reduction amount)*	€1.164M (€764M)	€278M (€178M)	€672M (€537M)	€1.700M (€1.100M)	€2.840M (€1.290M)	€9.100M (€4.900M)
Post-transaction shareholder ownership [75]	11%	13%	13%	10,90%	15%	13%

The CGG transaction significantly deviates from the so-called dilution trends observed in the previous transactions.

Indeed, the key financial parameters of the CGG restructuring can be summarized as follows:

– reduction in the gross financial debt from US$2.95 billion to US$1.2 billion;

– minimum holding of shareholders after conversion of the debt[76] amounting to 3.2% of the capital, which may be increased to 21.8% in the event of subscription to the share capital increase with preferential subscription rights, and implementation of mechanisms in case of return to better fortune structured in the form of warrants.

Several factors were taken into account to justify CGG's shareholders' level of dilution:

[73] Nicole Notat and Jean-Dominique Senard's report on "*the company as an object of collective interest*" goes even further, since it recommends including in the French Civil Code itself a new paragraph in its article 1833 according to which "*the company must be managed in its own interest, taking into account social and environmental issues*".

[74] Before injection of new liquidity and implementation of mechanisms of return to better fortune.

[75] Before participating, if necessary, in the injection of new liquidity and implementation of mechanism of return to better fortune.

76 Assuming the absence of participation by existing shareholders in the capital increase with preferential subscription rights.

– first, the enterprise value of the CGG group was, from a strict economic standpoint, significantly lower than the face value of its net debt. Thus, in a liquidation scenario, the shareholders would have lost their entire investment;

– second, the debt to equity conversion amount (approximately US$1.8 billion) was nearly 20 times higher than CGG's market capitalization and should have required "full" dilution of the existing shareholders. By way of comparison, it should be recalled that for Solocal, Latecoère or Technicolor, the amounts converted amounted to, respectively, €764M, €178M and €1,290M for market capitalizations of approximately €100M, €120M and €160M;

– finally, the shareholders had the possibility to increase their shareholding position on favorable terms by participating in the issuance of shares to which are attached warrants (ABSA), with preferential subscription rights and, where applicable, by exercising the warrants allocated to them for free.

As a general perspective, there is a fundamental trend in France and abroad in insolvency law aiming at depriving shareholders of any veto right in defining a restructuring plan which purpose is to ensure the sustainability of the business. Thus, article 12 of the draft *Insolvency* European Directive published on 22 November 2016[77] provides that member States must take the necessary measures to keep shareholders from unreasonably preventing the adoption or implementation of a restructuring plan which would restore the viability of their company. To this end, the draft Directive recommends the introduction of a mechanism for the adoption of a restructuring plan and which divides the company creditors by classes. As in US practice, a cram down mechanism would allow a higher ranked class to impose its vote on a lower ranked class, with shareholders constituting a class of their own and potentially witnessing a restructuring plan being adopted against their wishes.

3. *The AMF's new expectations on independent expertise in restructuring transactions*

In order to convince shareholders to approve the transactions required to implement a restructuring plan, it is market practice[78] to provide, as part of the prospectus submitted to the AMF for approval, an independent expert report to certify that the financial terms of the restructuring plan are fair to the shareholders. It should also be noted that creditors, even though supposed to be reimbursed before shareholders, do not benefit – most of the time – from as much consideration[79], even though in the case of CGG an expert report on the treatment of holders of convertible bonds was produced in the context of litigation with certain claimants.

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77 This project has not yet been adopted as of today.

78 Article 261-2 of the AMF General Regulation requires an independent expert report only if, following a reserved capital increase with a discount greater than the maximum discount authorized in the event of a capital increase without preferential subscription rights, a shareholder acting alone or in concert takes control of the issuer within the meaning of Article L.233-3 of the Commercial Code.

79 The AMF, with the good information of shareholders in mind, requires that the prospectus relating to issuances without preferential subscription rights be approved by the regulator and disclosed to the shareholders at least 15 days before the general meeting convened to approve the implementation of the restructuring. In the case of CGG, such early approval by the regulator raised some issues as regards the update of information disclosed in the prospectus, notably financial forecasts.

Although independent expert reports have long held that restructuring was fair to shareholders on the premise that a survival opportunity is always better than immediate death, the AMF has, in the CGG transaction, made some requests that go far beyond this simple factual observation. Thus, in addition to CGG's "classic" multi-criteria valuation work, the independent expert carried out a study of "*the split of the value between the stakeholders in the restructuring […] in order to present the overall outcome of the restructuring for the shareholders, the senior notes holders and the convertible bonds holders*"[80]. More precisely, the expert analyzed the evolution of the shareholders' assets[81] and of each class of creditors before and after restructuring, relying for the creditors not only on the face value of the converted debt but also on their market value.

In conclusion, even if securities law tends to distil, into insolvency law, some rules stemming from the guiding principle of equal treatment, the DNA of restructuring of listed companies remains profoundly impacted by the asymmetrical treatment of the various stakeholders. It will therefore be long before one can assert, as did Victor Hugo, that "equity is the first expression of equality".

[80] Ledouble firm's report, p. 9.

[81] It should be recalled that CGG's shareholders subscribed in February 2016 to a capital increase with preferential subscription rights for an amount of approximately €350 million.

SHAREHOLDING CREDITORS: RISKS AND OPPORTUNITIES

Nicolas Partouche[82], Lawyer – Jeantet AARPI

The debt restructuring of CGG S.A. represents a new example of French law illustrating the use of debt-equity swaps in a distressed listed company.

Debt-to-equity swap, *lender-led plan*, *loan-to-own…* these techniques derived in particular from the US Chapter 11 mechanism and adopted by other EU Member States[83] are now well-known as well as tested and tried in France.

These mechanisms, applied under the confidentiality requirements of amicable procedures for the restructuring of LBOs[84] among other, may also be implemented in the context of pre-insolvency and insolvency procedures (Safeguard / *Sauvegarde* or Receivership / *Redressement judiciaire*). The debt-to-equity swap, while feasible for companies whose shares are not traded publicly[85], and although faced with mistrust from conventional banking lenders[86], has a special incidence for a listed company. Emblematic precedents include Eurotunnel (2006-2007), Thomson (2009-2010) or Belvédère (2013).

In line with the long-standing wishes of many commentators[87], the Macron reform[88] enables at long last to overcome obstruction from non-consenting shareholders in France, but only under a judicial receivership, in limited cases and in accordance with very tight requirements (Article L. 631-19-2 of the Commercial Code). While a major step has been overcome, our French law on distressed companies however needs to continue evolving. The draft European Directive on "preventive restructuring frameworks" is moving in this direction.

The CGG case gives us the opportunity to question a number of risks and opportunities represented by the parties that we have chosen to call the "*Shareholding Creditors*".

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[82] The remarks expressed in this article may reflect exclusively the opinion of the author. Neither Jeantet AARPI nor the parties represented by the law firm in this case or in any other case may be held liable for the author's opinion.

[83] R. Dammann & C. Paulus, *Le debt-to-equity-swap dans le cadre des procédures collectives en Allemagne et en France : état des lieux et perspectives*, Petites Affiches n°065 p.21, 30/03/2018.

[84] P. Dubois & J. Gumpelson, *Méthodologie d'une restructuration de LBO : quelques vérités*, Option Finance / Option Droit & Affaires March 2017 n°334 p.12.

[85] See e.g. the restructuring of SAUR in *Restructuration SAUR : la conversion de créances en capital dans le cadre d'un plan lender led*, R. Dammann & G. Lebreton, Bulletin Joly Sociétés 2013 n°11 01/11/2013.

[86] S. Coiffet, *Lender-led : un contexte qui change la donne*, Option Finance / Option Droit & Affaires March 2018 n°390 p.14.

[87] See in particular: G. Couturier, *Droit des sociétés et droit des entreprises en difficulté*, LGDJ, n°588; S. Vermeille, R. Bourgueil & A. Bezert, *L'affaire Belvédère ou les effets contre-productifs du droit français des entreprises en difficulté*, RTDF 2013 n°3 p.1 et s.

[88] Law No.2015-990 of 6 August 2015 on *Growth, Business and Economic Equal Opportunities*

1. Opportunity to avoid dismantling (for the company) and certain loss (for the creditor) with the hope of a "return to better fortunes": A Marriage of Reason

The decision for proposing that creditors become shareholders generally results from an impasse suffered both by the company and by its creditors.

For the company, this decision should be a must – according to some commentators[89] - in line with an approach guided by value allocation, whenever the debt amount exceeds the enterprise value.
It is first and foremost a lever, an opportunity, but sometimes even the only solution for the company to avoid being dismantled when its future cash flows, as reasonably expected, will not be sufficient to pay off an excessively high debt burden.

The affected creditors are most frequently confronted to the same type of impasse: because of the nature of their claim, the lack of sureties, and their relative weight in the overall indebtedness of the company, they cannot expect to see any acceptable repayment of their loan under a rationale of business disposal or of going concern or in a liquidation scenario perceived as less likely to preserve the value.

The debt-to-equity swap is a restructuring measure at the lowest cost for the distressed company, everything else being equal, since the effort or sacrifice will be agreed or suffered, on the one hand by the historical shareholders whose investment loss is already reflected in the lower share price, and on the other hand by the creditors who are most frequently skilled professional investors and know that there is no other solution. Hence, this is about accepting the reality.

It is most of all about hoping that the fruit of better times after a return to profitability can be shared together on the medium or long term: the creditor no longer expects to be simply reimbursed, and now adheres to a principle of *affectio societatis* supposed to unite the shareholders and the company. The creditor's interest is thus closely linked to the interest of the company, and the creditor may sometimes intend to take over some control over the company to impel a change of strategy.

From a more macroeconomic perspective, the debt-to-equity swap is a necessity under a rationale of attractiveness, initially whenever the debt is raised on a highly competitive global investment market, but also in a turnaround phase if we agree to consider that it is necessary to attract investment professionals in special distress situations in France.

The opportunity of this marriage of reason is however not risk-free.

2. The risk of a marriage guided only by necessity: an impossible cohabitation?

Imagining your creditors as becoming shareholders would mean projecting yourself in a risky situation considering that the conception of a company in the collective unconscious is based on

[89] See S. Vermeille, R. Bourgueil & A. Bezert cited above

antagonistic relations between the stakeholders[90]: employer versus employees, company versus creditors, shareholders versus creditors.

Two risks are often presented as the most acute.

The possibility given to creditors/now shareholders to express themselves in the corporate life leads to a fear of interference perceived (i) by the company as a threat against the necessary definition of a medium and long term strategy, and (ii) by the creditor, as a risk of liability if he should intervene too directly.

This risk can be addressed rather efficiently from the perspective of voting rights linked to the shares, by deferring the creditor's access to the equity.

For instance, using equity-redeemable notes (ORA, *Obligations remboursables en actions*) limits the voting rights to the Bondholders Committee or to decisions affecting directly the rights of the noteholders (i.e. the corporate business decisions are therefore excluded).

As an alternative, the use of warrants can be considered for some categories of creditors, similarly to the Belvédère case.

Preferential shares without voting rights can also be issued, even though their amount is limited to one fourth of the share capital in listed companies (Article L. 228-11 paragraph 3 of the Commercial Code).

The management of voting rights attached to shares can also be handled by a third party acting on behalf of the creditors in the context of a management trust (*fiducie-gestion*).

The second – and well-known – risk is said to be a conflict of interests. A shareholding creditor would supposedly be necessarily in a situation of conflict, either because he remains a creditor of the company (partial conversion in equity or concurrent subscription of new money), or due to his original nature as a creditor. Whereas the shareholder is by nature regarded as a long term partner of the company, the creditor may be more interested in seeking immediate cash returns from his stakeholding, which would be a source of destabilisation for the company.

The risk of governance destabilisation may be addressed in several ways: opting for a dualistic governance to enable a representation of the (now) shareholding creditors on the supervisory board via a so-called non-executive corporate office[91], which limits their interference to more macroeconomic decisions. Negotiations on the restructuring can also be an opportunity for the stakeholders to secure express commitments from the creditors and from the company, for instance on employment, a non-dominant representation on the governance bodies, or even a reinforced presence of independent board members.

[90] As illustrated by the intensity of the current debate about the definition of a company in the Loi Pacte bill.

[91] In the sense of the AFEP-MEDEF Code of Governance for Listed Companies, November 2016, a technique used in particular in the previously mentioned restructuring of SAUR.

Ideally, the stability of the shareholding structure could be boosted by lock-up commitments made by the converting creditors, as is practiced at other times in the life of a listed company (e.g. IPOs), even though this option is probably more theoretical in the case of investment funds whole model may rely on the ability to resell their stake as quickly as possible after the conversion.

Last but not least, and at the risk of sounding simplistic, is it reasonable to oppose so systematically the shareholder of a listed company to a converting creditor? Is it fair to sanctuarise the shareholder in this image of a long-term partner of the company adhering to the principle of *affectio societatis* who would necessarily be more respectful of the corporate interest? As opposed to the financial creditor, presumed to be a speculator, particularly if it is a foreign entity specialised in distressed investment who would accumulate all of the flaws?

The reality is actually more nuanced than that.

Affectio societatis is a highly relative notion in a listed company since situations differ greatly due in particular to the diversity of the shareholders who own the corporate capital (asset investors, natural persons, institutional or financial entities, small individual shareholders or anchor shareholder, funds, activists, etc.).

Furthermore, the necessity of introducing into French law a mechanism enabling to overcome the unreasonable opposition of non-consenting shareholders shows that relations between the company and its shareholders are not necessarily easy, whereas negotiations with purely financial investors can be rougher yet more rational and therefore more predictable.

Conversely, the influence that converted creditors would have in view of the proportion of shares they frequently end up owning should not be neglected, while the splintered floating shareholders struggle by definition to rally around and speak in a single voice.

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The possibility – forced or agreed – of converting debt into equity is, in our opinion, an opportunity, both for the company and for its creditors, to overcome difficulties in an environment now well-charted to limit the risks to an acceptable level for everyone.

VOTING RIGHTS OF THE HIGH YIELD NOTEHOLDERS IN CGG'S SAFEGUARD PROCEEDINGS

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High yield bonds are defined as bonds which do not benefit from an "*investment grade*" rating, and are therefore deemed to carry certain risks and a strong speculative character in return for high interest rates generally offered to investors[92]. One of the notable features of high-yield bonds lies in the multitude of players on the scene. Such a note is generally structured around a relationship between an issuer, a trustee, a custodian, participants and beneficial owners. The issuer enters into an indenture agreement with the trustee, often subject to the laws of the State of New York, stating the principle of the bonds issuance, the rights of the trustee and the custodian, and where applicable the associated security package. While bonds are directly subscribed for by the custodian, the beneficial owners take participations in this issuance (called book-entry interests) from the custodian, the latter remaining the sole holder of the bonds (global notes). High yield notes therefore build a system in which participating investors do not have a direct relationship with the issuer.

The safeguard procedure opened for CGG had this specificity such that, due to the numerous high yield bond issuances of CGG, practitioners had to combine this American law-governed mechanism with the rules governing French insolvency proceedings. As previously explained on several other occasions[93], this combination is not self-evident and raises a number of issues. Our engagement with the steering committee of CGG's high yield noteholders allowed us to implement certain practical solutions to overcome these issues. While the mechanics of the indenture remain untouched during the amicable proceedings phase (I), said mechanic is impacted when the restructuring measures are to be imposed through insolvency proceedings (II).

I. Situation of high yield noteholders in French amicable proceedings

Most French debt restructuring discussions open under pre-insolvency amicable proceedings such as "*mandat ad hoc*" and "*conciliation*". The intervention of an *ad hoc* agent ("*mandataire judiciaire*") or a conciliator ("*conciliateur*") requires, both from a legal and practical standpoint, a dialogue with high yield bondholders (A), but the opening of such preventive proceedings does not disrupt the mechanic provided by the indenture insofar as the financial "efforts" expected from these creditors cannot be imposed on them (B).

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92 Financial lexical, Vernimmen.net. ; *adde* T. Lefranc : J.-Cl. Banque - Crédit - Bourse, Fasc. 1880, spéc. 1 s.

93 N. Ankri, *Les procédures collectives françaises sont-elles adaptées aux financements internationaux?*, *in* Mélanges AEDBF VI, 2013; N. Ankri and D. Chijner, *Un créancier high yield peut-il bloquer une procédure de sauvegarde?*, LesEchos.fr, 6 juil. 2016 (English version: "*Could a high yield noteholder block a safeguard procedure*": https://www.dlapiper.com/en/uk/insights/publications/2016/07/could-a-high-yield-noteholder-block-a-safeguard/).

A) Default caused by the opening of amicable proceedings

The financial documentation applicable to high yield note issuances is no exception within the financing documentation landscape and typically provides for several events of default directly related to the opening by the issuer of amicable proceedings or formal insolvency proceedings. The default caused thereby triggers an automatic or potential acceleration of all sums due under the indenture. It should be reminded that acceleration provisions for this particular event of default are not enforceable under French law[94]. It may however be counter-productive to simply ignore them, and a waiver request should therefore be considered.

Indeed and first of all, a debtor will rarely be tempted, at this preliminary stage of discussions with its creditors, to ignore its undertakings and voluntarily put itself in default, even if said default is not enforceable. It will prefer in practice to begin these negotiations, essential to its survival, IN THE most favorable circumstances. Secondly, in cross-border cases such as CGG, the reaction of foreign courts to such a default, even though it may be unenforceable before French courts, is very uncertain. Thus, cross-default provisions may result in the acceleration of other debts of the issuer or its subsidiaries, especially if, as in CGG, these other debts were contracted by foreign subsidiaries outside the European Union and without an automatic recognition procedure (Norway, United States, etc.). Similarly, where the debtor has granted securities on assets located in such foreign jurisdictions, creditors may not be fully deprived of actions.

For these reasons, CGG requested and obtained the sought waiver[95]. Deciding not to seek such a waiver would not have been very efficient in our view nor worth the trouble since the required majority is generally a simple majority, easier to obtain than the unanimity required for more substantial amendments.

B) Application of contractual majority rules in the event of amicable proceedings

The essence of amicable restructuring proceedings is the consensus-building. It is therefore not surprising that these proceedings do not affect the mechanics of contractual provisions, including the rules relating to amendments. The indenture traditionally provides that amendments require the prior consent of the beneficial owners. Once an amicable agreement has been reached under the aegis of an *ad hoc* agent or a conciliator, the issuer must submit an amendment proposal (known as "*consent solicitation statement*") reflecting the contemplated restructuring measures provided by the amicable agreement, on which the beneficial owners will vote with the required majority. This consent will be all the more difficult to obtain as the number of beneficial owners is large and their identification is made difficult given the exchanges of the notes on the market. The majorities applied in this respect are different depending on the modifications sought. In particular, a debt write-off or a debt for equity-swap will most often require the unanimous consent of the beneficial owners. CGG's indentures were no exception.

[94] See art. L. 611-16 and L. 622-29 of the French commercial code.
[95] CGG's press release of February 20, 2017.

In the case at stake, the agreement reached between CGG and its creditors during the amicable phase provided, among other things, for a debt for equity-swap, which therefore required unanimous consent of the noteholders, in practice impossible to reach in light of the high number of noteholders and, above all, in light of the disproportionate power to block, and therefore to leverage the negotiation, that unanimity rule would give each noteholder.

It is notably for this reason, in addition to others linked in particular to the contemplated Chapter 11 proceedings in the US, that an implementation of the restructuring through a safeguard procedure was chosen, including the setting up of creditors' committees and of a single general meeting of bondholders.

II. Voting modalities of high yield noteholders within the general meeting of bondholders

Under French law, where the conditions are met for the setting-up of creditors' committees and where part of the debtor's debt consists of French or international bonds, the bondholders must be consulted within a single general meeting gathering all bondholders of every issuance[96]. This raises however the question of which bondholders should be convened and authorised to vote from a legal standpoint (A). Once the right creditors are identified, a solution has to be found which, although not perfect, allows for compliance with French rules without disrupting the spirit of the indenture's process (B).

A) Who is the bondholder in a high yield notes issuance?

Where the setting-up of a single general meeting of bondholders is required, the representatives of the various classes of bonds are set aside by French law and only the creditors actually holding the bonds issued by the debtor may sit and vote at that general meeting. The qualification of a bondholder in the context of high yield notes is however not self-evident when looked through the prism of French law. In view of the many similarities existing with another case, the analysis carried out in CGG had to be made through the solutions highlighted in the famous Belvedere saga[97], which is the only French precedent existing on this matter and for which we were already representing the trustee at the time. This precedent should serve as a reference in order to determine who amongst the trustee, the custodian or the beneficial owners should be considered as a bondholder entitled to vote under the safeguard plan.

The rule of conflict of laws in this matter, now well established[98], is clearly highlighted by the Belvédère decision. The law governing the source of the claim is the only applicable law to

[96] See art. L. 626-32, al. 1er of the French commercial code.

[97] Cass. com., 13 sept. 2011, n° 10-25.533, FS-P+B : JurisData n° 2011-018623 ; N. Ankri and D. Chijner, « *Certainty at last* », IFLR novembre 2011, p. 43 ; JCP E 2012, 1000, obs. Ph. Pétel ; Rev. proc. Coll. 2011, comm. 173, obs. M. Menjucq ; RD bancaire et fin. 2011, comm. 20, D. Legeais ; D. 2011, p. 2518, note L. d'Avout et N. Borga ; Bull. Joly sociétés 2011, p. 987, note R. Libchaber.

[98] See M.-L. Niboyet and G. de Geouffre de la Pradelle, *Droit international privé*, LGDJ, coll. Manuels, 2011, 3e éd., n° 38.

determine the status of a creditor[99]. The issuance agreements entered into by CGG were subject to New York law, as a result of which the rules of New York had to be examined to determine who the bondholder was. While the Belvédère case confirmed the trustee's status as a creditor for filing a proof of claim, the latter was not necessarily the only one able to claim this status.

Indeed, the fact that the status of a creditor must be deduced from the provisions of the indenture excludes any systematization of that solution, as one author recently pointed out about the capacity to vote within the general meeting of bondholders[100]. If we have always agreed with this analysis[101], this should be pushed further in an attempt to determine who the bondholder is for the purposes of the vote.

In the case at stake, the analysis of the indentures allows it to be established, in a rather classical way[102], that the custodian is the legal holder of the bonds issued by CGG insofar as it actually subscribed for the bonds whereas the beneficial owners only took an indirect interest in the loan (book-entry interest). This scheme makes the custodian the legal owner[103] (aka the registered owner) of the bonds, in contrast to the beneficial owner who is only the economic beneficiary and not the legal holder.

Thus, the custodian becomes the centre of a voting process with unique characteristics.

B) Voting modalities in light of the specific mechanic of high yield notes

When the time comes to consider the modalities of the vote within the single general meeting of bondholders (which decisions are taken by a two-third majority based on the total amount of the claims whose holders expressed a vote), here again the high yield notes stand out because of their particularities. The decision-making process, which must ultimately lead to the vote of the bondholder, is in fact divided into two stages by virtue of the contractual provisions governing the indenture: the first stage is necessarily that of the instruction given by the beneficial owners to the custodian as to the direction of their votes; the second stage is precisely that of the vote by the custodian.

One pitfall to avoid is that of a process requiring unanimity which, if it were in conformity with the terms of the indenture, would destroy the very purpose of the single general meeting scheme, hence the provisions of Article L. 626-32 of the French Commercial Code according to which a two-third majority applies "*regardless of the law applicable to the issuance agreement*". The solution cannot

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[99] See Cass. com., 13 sept. 2011 préc. : "*If, under Article 4(2)(h) of Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, the law of the State in which the insolvency proceedings are opened determines the rules concerning the lodging, verification and admission of claims, it is for the law of the source of the claims to define the status of creditor"*.

[100] See Ph. Pétel, *Procédures collectives avec comités de créanciers : qui vote à l'assemblée générale unique des obligataires ?*, Rev. proc. coll., n° 1, janv. 2017, étude 4.

[101] N. Ankri, *Les procédures collectives françaises sont-elles adaptées aux financements internationaux?*, préc., n°19, n°38.

[102] *Ibid.*

[103] See on the notion of "legal ownership" within a high yield loan: R. Dammann et A. Albertini, *L'arrêt Belvédère : la réception du Trust et de la Parallel Debt en droit français*, JCP E, n° 46, 17 nov. 2011, 1803.

therefore be perfectly in line with the constraints of the indenture. The law governing the proceedings must prevail. However, if one considers that the custodian must vote, a practical problem arises: the custodian will not take the responsibility of voting for the plan without having obtained the majority required under the terms of the indenture... unless a system allows it to faithfully transcribe the voting instructions received from the beneficial owners. Thus the solution adopted was the possibility for the custodian to divide its vote: (a) the beneficial owners express their vote, these votes being received in practice by the so-called calculation or tabulation agent who organizes this vote electronically, then (b) the custodian grants a mandate to the tabulation agent to vote according to the votes received, *i.e.* in favour of the plan up to the votes received in this respect or against the plan up to the votes received in this other respect.

It should be specified that, in the event where certain beneficial owners wished to attend and vote at the meeting in person, they had to be granted a mandate from the custodian (or a sub-mandate by the tabulation agent) to the extent of their own participation, in order to ensure that no one could potentially invalidate the process by voting without being a bondholder or a bondholder's proxy (no provision of French law restricting the possibility of the granting of a common law proxy to vote at the single general meeting of bondholders).

This solution could be used as a model for future restructuring transactions because, although it is probably not perfect with regard to the "schizophrenia" of the voting bondholder[104], it nevertheless allows for the integrity of the votes expressed by each of the beneficial owners to be respected, while giving full effect to the mandatory two-third majority rule provided by French law.

[104] …that we sometimes criticized: see. N. Ankri, *Les procédures collectives françaises sont-elles adaptées aux financements internationaux?*, préc., n°36.

GRADUAL HARMONISATION OF NATIONAL LAWS AND CONSIDERATION FOR THE CHALLENGES OF GROUPS OF COMPANIES

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The various entities of CGG Group were treated according to different legal systems, but in a coordinated manner: the earlier presentation of the process demonstrates the challenges raised by a globalised economy and credit finance. The insolvency practitioners, the legal counsels and the courts were confronted to numerous difficulties relating to differences between the applicable legislative systems, which required diverging national rules to be combined.

On a European scale, the coordination of procedures now constitutes a "meta-law": it is imperatively enforceable on the EU Members States under the EU Regulation of 20 May 2015, despite existing differences between the legal systems of each Member State. Conversely, the coordination of proceedings is relatively unregulated in terms of relations between an EU Member State and a non-EU third country, when addressing a distressed group of companies.

1. What does international private law say?

In France, the courts, under the guidance of the Court of Cassation jurisprudence, recognize foreign decisions issued under a foreign procedure against an insolvent company whenever the practitioner appointed in the proceedings requests an enforcement (*exequatur*) of the decision against assets located in France. This recognition is subject to three prerequisites:
- The foreign judge must have proper competence in the jurisdiction,
- No other similar insolvency procedure against the same debtor was previously opened in France,
- The foreign decision should not clash with the French conception of international public order. Public order here relates to the essential procedural principles before a foreign judge and to the effects of the foreign decision on the assets affected by the petition for enforcement.

The competent judge is the judge of the jurisdiction where the enforcement is requested.

In the US, the jurisprudence of bankruptcy courts and of the Supreme Court rely, as mentioned by Judge Glenn, on the provisions of Chapter 15 of the Bankruptcy Code transcribing the UNCITRAL Model Law on international insolvency, similarly to 42 other States in various regions of the globe. Inspired by the principles enacted in the former Chapter 304 of the Bankruptcy Code, the courts recognize a primary foreign procedure under certain conditions related to the Centre of Main Interests (COMI) of the debtor, the presence of assets on US soil and the protection of American creditors.

However, there is no regulated coordination of procedures affecting groups of companies, neither in France nor in the US.

The applicable rules remain largely independent of each other, and would address a French company and an American company separately, even though they may both be controlled by the same group.

Consequently, practitioners and courts have had to imagine new solutions to better coordinate the proceedings, as illustrated by A. W. Kornberg & B. S. Hermann. In the CGG case, it was thus necessary to take into account requirements of time and differences in laws: The CGG *Sauvegarde* procedure had to be initiated in France before filing for Chapter 11 in the US in order to ensure that a Chapter 11 procedure would not be regarded as a presumption of insolvency of the French company, which would have prevented the opening of a French *Sauvegarde* procedure. This is also the reason why the US procedure was filed immediately afterward, in order to benefit from the local provisions related to first-day motions. Lastly, the plan approval conditions had to be coordinated to ensure that voting could take place to secure the consent of both the creditors and the shareholders who are treated more favourably by French law than under US law.

This case highlighted the need for an effective harmonisation, considering that credit relies on trust. Harmonisation should:
1) make the bankers more confident when granting a loan,
2) give the creditors (investors and bankers) a similar, therefore reassuring, legal framework,
3) and increase the predictability for investors.

2. Is it possible to harmonise?

Insolvency proceedings constitute a set of substantive rules and procedural rules, with the former governed by civil and trade law in each State, and the latter by each procedural law. By nature, they are all substantially different.

There are nevertheless genuine prospects for harmonisation.

Several factors seem to follow this direction, since the legal and financial frameworks of corporate operation are often similar, regardless of the legal system. This includes terms for granting loans, the banking system, accounting rules, types of commercial companies, collateral guarantees; these mechanisms are comparable, even if the legal texts and the detailed rules may diverge.

Some obstacles however still persist for an effective harmonisation.

From the perspective of principles governing insolvency proceedings, various areas should be noted where differences are still significant: taxation of corporate profits, protection of payroll and tax liabilities, role of employees, role of the courts, or shareholders’ rights.

From a more technical (or procedural) standpoint, a number of points should be mentioned: the conditions of supervision of the insolvent debtor and its management powers, the role of judicial bodies, the voting conditions for creditors, hearings of the parties, and the remedies provided by existing rules of procedure.

Based on this assessment, the convergence of laws appears to be a challenge.

However it is important to note a significant trend among national lawmakers to seek a convergence of the rules, which could conceivably lead to some harmonisation of the laws applicable to distressed companies and groups of companies.

3. How to harmonise?

The contribution of the UNCITRAL Legislative Guide on Insolvency Law adopted in 2004 (ref. uncitral.org) should be stressed, containing standard rules acceptable by all legislative systems.

The issues addressed by this Guide clearly reveal all possible factors of convergence between national laws.

Guidelines were adopted in the following areas:

- Determination of individual entrepreneurs and private companies to be governed by an insolvency law,
- Conditions for the commencement of proceedings, based on a durable cessation of payments, a risk of insolvency or a situation of over-indebtedness,
- Management of the debtor during the insolvency proceedings under the supervision of an insolvency practitioner,
- Continuation of contracts left up to the judgement of the practitioner,
- Priority payments recognized for procedural costs, administrative claims, and trade debts arising after the commencement of the procedure (or after the petition to open the procedure),
- Verification of the claims,
- Definition of a period prior to the commencement of proceedings during which any actions prejudicial to the collective interests of the creditors may be annulled or rendered non-binding,
- Determination of a turnaround solution submitted to the approval of creditors and ratification by a judicial authority,
- Possibility of imposing a plan to all creditors provided that it respects the interests of all parties and does not prejudice their rights to a greater extent than their treatment would have in the context of a liquidation,
- Search for a business continuity solution preferentially to a cessation of business,
- Possibility to organise a full disposal of the company at its going-concern value, which provides for favourable conditions for business continuity – and sufficient settlement of the liabilities,
- Classification of claims based on priority ranking and security guarantees held on the assets and rights of the company,

- Discharge of outstanding debts for individual entrepreneurs of good faith after disposal of their assets, said debt discharge inspired both by contemporary law and antique law being regarded as a solution for turnaround,
- Monetary liability of the corporate officers and directors whose mismanagement has resulted in the company's insolvency (primarily in Part 4 of the Guide),
- Possibility of prohibiting temporarily the corporate officers and directors guilty of mismanagement from holding management functions (Part 4 of the Guide).

In Europe (and in France, similarly to other EU Members States), the convergence of laws will require the application of a European Directive currently under review (Proposal COM/2016/0723 Final of 22 November 2016). This draft Directive requires EU Member States to harmonise their laws to provide a framework for preventive restructuring of distressed companies, a standardized format for restructuring plans, and the discharge of debts for insolvent entrepreneurs. Outside Europe (particularly in the US), this harmonisation can result from the transcription of the guidelines of the UNCITRAL Legislative Guide.

The harmonisation of national insolvency laws is not a response to any intention to standardise the laws uniformly or to any legal imperialism; it responds to the will of Member States themselves to provide a predictable legislative framework protecting the interests of investors. Therefore, it is not just one option among others, but rather a natural trend resulting from the fact that trade law follows the needs of business and credit finance.

4. Groups of companies faced with legal harmonisation

In a second step, UNCITRAL then addressed the special issue of groups of companies. The UNCITRAL Legislative Guide on Insolvency Law was thus complemented with a third part adopted in 2010, dedicated to the "*Treatment of enterprise groups in insolvency*". This Part 3 of the Guide constitutes an indispensable tool to build national or international standards for a coordinated management of proceedings opened against several companies belonging to the same group.

Part 3 of the Legislative Guide addresses practical and legal issues faced by insolvency practitioners:
- Coordination of proceedings,
- Exchanges between insolvency practitioners,
- Financing subsequent to the commencement of proceedings in a group context.

UNCITRAL looked at the issue of the Centre of Main Interests of a group with reference to the COMI of an insolvent company. It was found that, while the coordination of the proceedings could be envisaged along the model of the primary/secondary proceedings tandem, this linkage should not dictate any hierarchy, due to the impossibility of determining a Centre of Main Interests for a group of companies. Hence the notion of close cooperation between the practitioners and between the courts in order to coordinate the treatment of the various entities of a group.

On this occasion, UNCITRAL reviewed the possibility of grouping the procedures, based on a mechanism common to both French law and US law, but not shared by other legislative systems. What French law calls "*extension of proceedings*" is called "*substantive consolidation*" in US law. This mechanism enables a pooling of separate assets belonging to different companies, each constituting a distinct legal entity. This consolidation should remain exceptional and must be ordered in the event of merged assets and liabilities or fraudulent actions by the corporate officers and directors (regarding difficulties on assets consolidation, see D. Staehelin, *No substantive consolidation in the Insolvency of groups of companies*, in H Peter, N Jandin & J Kilborn, *The challenge of insolvency law reform in the 21st century*, Schulthess, Zurich 2006, p. 213).

In Part 3 of the Legislative Guide, UNCITRAL also recommends the appointment of a single insolvency practitioner or the same practitioner for several procedures, and addresses the delicate issue of the annulment of actions prejudicial to the collective interests of the creditors: the group context requires taking such special situations into account, where payments or asset transfers may have taken place between two companies belonging to the same group prior to the commencement of insolvency proceedings, and might reveal either a policy satisfying the group's interests or a deliberate impoverishment of the assets of a subsidiary.

One chapter in Part 3 looks at the specific issues of multinational groups. In this instance, it is about taking into account the differences between the laws applicable to each group entity: a coordination of proceedings requires the special implication of the competent judicial authorities in each relevant State.

UNCITRAL is currently pursuing its work on this basis with the definition of a draft Model Law intended for "*Facilitating the cross-border insolvency of enterprise groups*". It proposes in particular the implementation of a planning procedure specific to groups, with a group representative appointed by the court, and defines the purpose of the coordinated proceedings as "*maximizing the overall combined value of the operations and assets*" of the various group companies involved (see among other the Working Group documents A/C.N.9/WG V/WP 152 of 21 Sept. 2017 and WP 158 of 26 Feb. 2018 on the uncitral.org web site).